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Supreme Court of the United States

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In re ASSICURAZIONI GENERALI, S.P.A.,

DR. THOMAS WEISS,

Petitioner,

v.

ASSICURAZONI GENERALI, S.P.A. and
BUSINESS MEN'S ASSURANCE COMPANY
OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court held that a California statute requiring European insurance companies to disclose Holocaust-era insurance policies was preempted by executive agreements with Germany and Austria which provided an alternative forum for resolution of such claims. In this case, the United States Court of Appeals for the Second Circuit held the state common law claims by the heirs of Holocaust victims against an Italian insurance company were preempted, despite the absence of an executive agreement and in the face of no other relief being available. This case thus poses the issue:

Whether common law state claims are preempted by federal foreign policy interests in the absence of an executive agreement and where no other recourse would be available to the plaintiffs.

LIST OF PARTIES

All parties in the lower courts have settled other than the Petitioner and Respondents.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Appendices	v
Table of Cited Authorities	vi
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Petition	7
THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND AN ISSUE WHICH IS SPLITTING THE LOWER COURTS CONCERNING WHEN STATE COMMON LAW LIABILITY IS PREEMPTED IN THE ABSENCE OF AN EXECUTIVE AGREEMENT AND WHERE NO OTHER FORUM WOULD BE AVAILABLE TO PROVIDE RELIEF TO THE PLAINTIFFS.	7

Contents

	Page
A. Does *Garamendi* Preempt State Common Law Claims?	9
B. Does *Garamendi* Apply in the Absence of An Executive Agreement?	12
C. Does *Garamendi* Apply When the Effect is to Leave the Plaintiffs' With No Possibility of Relief?	19
Conclusion	21

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Decided And Filed January 15, 2010 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of New York Dated October 14, 2004 ..... 16a

Appendix C — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Filed April 12, 2010 ..... 54a

Appendix D — U.S. Letter Brief Dated October 30, 2008 ..... 56a

Appendix E — Supplemental U.S. Letter Brief Dated October 27, 2009 ..... 72a

TABLE OF CITED AUTHORITIES

Page

Cases

In re Agent Orange Product Liability Litigation,
373 F.Supp.2d 7 (E.D.N.Y. 2005) 10-11

Altria Group, Inc. v. Good,
129 S.Ct. 538 (2008) 12

American Insurance Association v. Garamendi,
539 U.S. 396 (2003) ..... *passim*

Barclay's Bank PLC v. Franchise Tax Board,
512 U.S. 298 (1994) 14

Central Valley Chrysler-Jeep v. Witherspoon,
456 F.Supp.2d 1160 (E.D. Cal. 2006) 15

Cruz v. United States,
387 F.Supp.2d 1057 (N.D. Cal. 2005) 10

Diermenjian v. Deutsche Bank, A.G.,
526 F.Supp.2d 1068 (C.D. Cal. 2007) 17

Ibrahim v. Titan Corp.,
391 F.Supp.2d 10 (D.D.C. 2005) 16

Medellin v. Texas,
552 U.S. 491 (2008) 17, 18

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 11, 20

Cited Authorities

Page

Movsesian v. Victoria Versicherung AG,
578 F.3d 1052 (9th Cir. 2009) 15

Oestereich v. Selective Service System, Local Board 11,
393 U.S. 233 (1968) 20

Reno v. Catholic Social Services,
509 U.S. 43 (1993) 20

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 11

Saleh v. Titan,
580 F.3d 1 (D.C. Cir. 2009) 9

Sanchez-Llamas v. Oregon,
548 U.S. 331 (2006) 18

Schydlower v. Pan American Life Insurance Co.,
231 F.R.D. 493 (W.D. Tex. 2005) 10

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 20

Steinberg v. International Com'n on Holocaust Era Claims,
133 Cal.App.4th 689, 34 Cal.Rptr.3d 944
(Cal. App. 2005) 15

Cited Authorities

Page

Taiheiyo Cement Corp. v. Superior Court,
117 Cal.App.4th 380, 12 Cal.Rptr.3d 32
(Cal. App. 2004) 16

Whiteman v. Dorotheum GmbH & Co., KG,
431 F.3d 57 (2d Cir. 2005) 16

Wyeth v. Levine,
129 S.Ct. 1187 (2009) 11, 12

Miscellaneous

Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997) ... 9-10

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, dated January 15, 2010, is reported at 592 F.3d 113 (2d Cir. 2010) and is attached as Appendix pp. 1a-15a. The order of the United States Court of Appeals for the Second Circuit, dated April 12, 2010, denying the petition for rehearing and rehearing en banc, is attached as Appendix pp. 54a-55a.

The District Court's order, dated October 14, 2004, is attached at Appendix pp. 16a-53a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Second Circuit, dated January 15, 2010, pursuant to 28 U.S.C. §1254. The United States Court of Appeals for the Second Circuit denied rehearing and rehearing en banc on April 12, 2010.

STATEMENT OF THE CASE

This case raises important questions about the Executive's power to make law and simultaneously to nullify long-standing state common law without following any sort of constitutionally or statutorily established procedure. It raises issues left unresolved by this Court in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), concerning whether state common law claims are preempted by the implied dormant foreign affairs power of the President in the absence of an executive agreement. Although as in *Garamendi*, this

case arises in the context of long-delayed (and denied) payment of contractual obligations owed to victims of the Holocaust, the Second Circuit's opinion in this case expands Executive authority far beyond what *Garamendi* allowed and conflicts with the approach taken by this Court and lower federal courts since *Garamendi*.

A. Delayed Compensation for Victims of Nazi-Era Persecution

In the years leading up to World War II, many Jewish families in Europe purchased insurance policies from an Italian company, Assicurazioni Generali, which was founded by Jewish merchants in 1831. Jewish and other persecuted minorities "purchased insurance policies from Generali believing this would provide protection against the rise of Nazi power." *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115 (2d Cir. 2010). However, Generali cooperated with the Nazis during the war and refused to pay the beneficiaries of those policies following the surrender of Germany and Italy.

After World War II, the Western Allies were concerned that the burden of reparations would hinder their efforts to rebuild Germany and established a moratorium on reparation claims with the London Debt Agreement. In 1996, German courts interpreted the treaty reunifying East and West Germany as lifting that moratorium. As a result, many Holocaust claimants filed suit against companies which did business with the Nazi-era German government

B. The United States-Germany Executive Agreements

In 2000, the United States and Germany reached an agreement for the German government to establish a foundation to "compensate all victims who suffered at the hands of German companies during the Nazi era." *Id.* at 116. In return, President Clinton pledged, through a formal Executive Agreement, that whenever a German company was sued on a Holocaust-era claim in American courts (state or federal), the Executive Branch would submit a non-binding statement of interest to the court expressing that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Garamendi*, 539 U.S. at 406. The United States-Germany Executive Agreement covered principally claims by former slave laborers ($1 billion) and forced laborers ($3 billion) that had been previously dismissed in federal courts.

The Executive Agreement between Germany and the United States specified that the Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC) to handle insurance claims against German companies. The Executive Agreement created a $250 million cap on such claims. The ICHEIC was formed in 1998 by several European insurance companies, including Generali, the State of Israel, Jewish non-survivor NGOs, and the National Association of Insurance Commissioners. The purpose

of the ICHEIC was to create a "voluntary, non-adversarial" forum for resolution of claims that arose under those policies. The United States reached a similar agreement with Austria, which also included insurance claims, and an agreement with France, which did not address insurance claims. The United States has negotiated no such agreement with Generali's home nation, Italy.

C. Generali Faces Lawsuits in American Courts

Various plaintiffs sued Generali in 20 separate actions in American courts, seeking damages for the company's refusal to pay contractually owed benefits to Holocaust-era policy holders or their heirs.[1] The Panel on Multidistrict Litigation transferred those cases to the Southern District of New York, which dismissed the claims under this Court's decision in *Garamendi*. *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 340 F.Supp.2d 494, 497 (2004) ("[I]t appears that the laws supporting litigation of plaintiffs' benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC.") Generali reached settlements with the plaintiffs in most of the cases, while the plaintiffs in the two remaining cases, Dr. Thomas

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1. In 2000 and 2001, Generali sought a statement of interest from the Clinton Administration asserting that the United States foreign policy interests favored dismissal, similar to what was promised to German insurers, but the Clinton Administration refused because of the absence of an executive agreement with Italy.

Weiss and Mr. Edward David, pursued appeals to the Second Circuit.[2]

D. The Court of Appeals' Decision

The Second Circuit, *sua sponte*, requested advice from Secretary of State Condoleezza Rice whether adjudicating the suits would conflict with the foreign policy of the Bush administration. The Department of Justice, not the State Department, responded with a letter brief asserting that the foreign policy interests of the United States favor using the ICHEIC as the exclusive forum for resolution of insurance claims. Significantly, however, the letter brief made clear the government did not consider its foreign policy interests to be an independent basis for dismissal of the cases. Following the election of President Obama, the Second Circuit made a similar request for advice of Secretary of State Hillary Clinton. The Department of Justice again responded with a letter brief which indicated the policy was unchanged under the Obama administration.

In January 2010, the Second Circuit affirmed the district court's dismissal, holding that a United States foreign policy interest existed in favor of using the ICHEIC as the exclusive forum for resolving Holocaust-

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2. The putative class cases settled at the briefing stage and over 25 individual plaintiffs pursued their appeals in the Second Circuit. After the court's *sua sponte* letter to Secretary of State Rice seeking the Bush Administration's position, all plaintiffs except Dr. Weiss and Mr. David settled. Petitioner has been informed that after the Second Circuit denied rehearing in April 2010, Mr. David reached a settlement with Generali.

era insurance claims. The court interpreted the executive agreements involved in *Garamendi* as being expressions of the government's foreign policy, rather than the definition of that policy. *Generali*, 592 F.3d at 118. Therefore, the Second Circuit determined that it did not matter whether the United States had negotiated an executive agreement with Italy; the letters from the Department of Justice were sufficient to express the government's policy regarding claims against Generali. The Second Circuit also found it irrelevant that unlike *Garamendi*, where the German and Swiss governments actively opposed California's disclosure statute, the government of Italy had never opposed plaintiffs' litigation against Generali.

The court of appeals rejected the argument by the plaintiffs that much stronger, traditional state interests — the right of citizens to pursue ordinary contract and tort claims under state law — were at play here than in *Garamendi*. *Id.* at 119. The Second Circuit applied *Garamendi* in holding that "state law must yield to the federal policy, regardless of the importance of the interests behind the state law." *Id.*

The Second Circuit also rejected the plaintiffs' argument that, because the ICHEIC had set a deadline of December 31, 2003 for accepting claims, dismissal of the suits would deny the plaintiffs the opportunity to pursue the claims in any forum. The court held that because the government said its policy was for the ICHEIC to be the exclusive forum for these claims, "if the ICHEIC door has closed on plaintiffs, it is because they chose to allow it to close." *Id.*

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND AN ISSUE WHICH IS SPLITTING THE LOWER COURTS CONCERNING WHEN STATE COMMON LAW LIABILITY IS PREEMPTED IN THE ABSENCE OF AN EXECUTIVE AGREEMENT AND WHERE NO OTHER FORUM WOULD BE AVAILABLE TO PROVIDE RELIEF TO THE PLAINTIFFS.

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court, in a 5-4 decision, concluded that a California statute, the Holocaust Victim Insurance Relief Act ("HVIRA") was preempted by federal law. The California statute applied to insurance companies doing business in California and required them to disclose details of insurance policies sold in Europe between 1920 and 1945 or face suspension of their license to do business in the state. California was concerned by the "stonewalling" by insurance companies and by the failure of the federal government to effectively gain information about these policies and payments under them.

This Court concluded that HVIRA was preempted by the foreign policy of the United States to "encourage European insurers to work with the ICHEIC [International Commission on Holocaust Era Insurance Claims] to develop acceptable claim procedures, including procedures governing disclosure of policy information." *Id.* at 421. The Court was explicit that

preemption was based on "the national position, *expressed unmistakably in the executive agreements signed by the President.*" *Id.* (emphasis added).

The district court and the court of appeals expanded on this Court's holding in *Garamendi* to conclude that the plaintiffs' claims against Generali were likewise preempted by federal law even though here, unlike *Garamendi*, common law claims are asserted,[3] no executive agreement exists, the Italian government never opposed the lawsuit, and no other recourse is available to the plaintiffs. The Second Circuit was explicit that its dismissal of plaintiffs' suits was based on this Court's decision in *Garamendi.* It stated: The Second Circuit declared: "[W]e hold under the authority of *Garamendi* that Plaintiffs' claims, which fall within the scope of the ICHEIC process, are preempted by the foreign policy of the United States." 592 F.3d at 120.

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3. The Weiss complaint, which is the basis of this petition for certiorari, presented 13 counts, 11 of which were under Florida common law.

The insurance agreement entered into between Generali and Petitioner's father Pavel Weiss provides that Generali would pay the insured's policy benefits anywhere in the world where payment was requested, which in this case was Florida.

In the spring of 1944, Pavel Weiss, and his wife Helen and their three young children Julie, Alice, and Salomon, were deported to Auschwitz. Mr. Weiss's wife and children were murdered upon their arrival at Dr. Mengele's instructions. After liberation in 1945, Mr. Weiss recuperated from shrapnel wounds, typhus, and other injuries and illnesses in a military hospital. After a brief return to Czechoslovakia, he emigrated to the United States, eventually settling in Florida in 1949 for health reasons. Mr. Weiss passed away in Miami Beach in 1985.

In finding preemption, the lower courts in this case failed to appreciate key differences between this case and *Garamendi*. These differences raise important unresolved issues of federal law and, in fact, have caused splits among the lower courts. This Court's review is needed to clarify the scope of preemption under *Garamendi* in light of this Court's subsequent decisions and in view of the split among the lower courts which has developed in applying *Garamendi*.

A. Does Garamendi Preempt State Common Law Claims?

In *Garamendi*, the question was whether a state *statute* was preempted by federal law, whereas here the issue is whether *common law* liability under state law is preempted. The central concern of *Garamendi* was with a state legislating in a manner that had extraterritorial effect and interfered with the foreign policy choices of the Executive. Thus, this Court held that the California statute was preempted because it "employs a different state system of economic pressure and in doing so undercuts the President's diplomatic discretion and the choice he made exercising it." *Id.* at 423-24 (quotation omitted); *see also id.* at 427 ("The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.")

These concerns are not present with common law claims. Indeed, as Judge Garland noted, "no precedent has employed a foreign policy analysis to preempt generally applicable state laws." *Saleh v. Titan*, 580 F.3d 1, 24 n.8 (D.C. Cir. 2009) (Garland, J., dissenting). *See* Jack Goldsmith, *Federal Courts, Foreign Affairs,*

and Federalism, 83 Va. L. Rev. 1617, 1711 (1997) (explaining that foreign affairs preemption should be limited to, at most, state laws that purposely interfere with foreign policy, not state laws that "are facially neutral and were not designed with the purpose of influencing U.S. foreign relations").

Contrary to the Second Circuit's approach, other lower courts have concluded that common law liability is not preempted by this Court's decision in *Garamendi*. In *Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493 (W.D. Tex. 2005), the beneficiary of a life insurance policy bought in Cuba brought a putative class action against the life insurer, alleging state law claims for breach of contract, fraud, and misrepresentation. The defendant moved to dismiss based on *Garamendi* and contended that the plaintiff's lawsuit was preempted by the process and purpose of the Foreign Claims Settlement Commission. The court denied the motion to dismiss and distinguished *Garamendi* on the ground that it involved a new statute and not common law claims. The court explained:

> The Court understands *Garamendi* to deal with a state's ability to pass a law which specifically circumvents federal foreign policy by creating a state cause of action which provides relief for its citizens. Here the Court deals with an individual's lawsuit and not a state's creation of a new cause of action.

Id. at 498. *See also Cruz v. United States*, 387 F.Supp.2d 1057 (N.D. Cal. 2005) (*Garamendi* is limited to conflicts preemption); *In re Agent Orange Product Liability*

Litigation, 373 F.Supp.2d 7, 79-80 (E.D.N.Y. 2005) (same).

Significantly, since *Garamendi*, this Court has evidenced a great reluctance to preclude state common law liability based on implied preemption. In *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009), this Court stressed the strong presumption against a finding of federal preemption, noting that "[i]n all preemption cases, and particularly in those . . . in a field which the States have traditionally occupied . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of the Congress.'" (Quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court in *Wyeth* explained that "[w]e rely on the presumption [against preemption] because [of the] respect for the States as 'independent sovereigns in our federal system.'" 129 S.Ct. at 1195 n.3.

This Court thus refused to find implied preemption of state tort liability for those injured by the failure of drug companies to adequately warn physicians and patients about possible side effects of prescription drugs. *See also Wyeth v. Levine*, 129 S.Ct. at 1205 (Thomas, J., concurring in the judgment)

> I have become increasingly skeptical of this Court's "purposes and objectives" pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or

But this case is quite different because there is no executive agreement. Unlike the countries involved in *Garamendi*, there never has been an executive agreement between the United States and Italy with regard to Holocaust-era insurance claims.[4] This matters enormously because *Garamendi* was based on the authority of the President to enter into executive agreements, including agreements to settle claims. An executive agreement is formally entered into, has the force of law, and can be overridden by a federal statute. It is a binding agreement of the United States with a foreign country.

But here the Second Circuit was willing to find preemption based on nothing more than the opinions expressed by the Department of Justice. There is no United States government action with the force of law, no action by the President himself, no conflict with any foreign law, and no opposition from any foreign government. This is a substantial expansion of the circumstances in which preemption will be found and raises an important issue as to the scope of preemption under *Garamendi* which this Court needs to resolve. *See Barclay's Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 329 (1994) ("The Executive Branch actions, press releases, and amicus briefs . . . are merely precatory. Executive Branch communications that

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4. The Court in *Garamendi* also cited extensive post-WWII negotiations and agreements concerning reparations and restitution for Holocaust victims involving the United States and Germany. In contrast, there were no international negotiations or agreements for restitution of victims' property with Italy after WWII, including up to the present time.

express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide reporting.")

Since *Garamendi*, lower courts have disagreed as to whether the existence of an executive agreement is necessary for such preemption. The Ninth Circuit, like the Second Circuit in this case, found that an executive agreement is not necessary for preemption. In *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009), the court found that a California law which extended the statute of limitations for claims arising out of life insurance policies issued to Armenian genocide victims conflicted with the Executive branch's clearly expressed foreign policy refusing to officially recognize the Armenian Genocide. The court acknowledged that there was an executive agreement in *Garamendi*, but held that this was not required to find preemption. *See also Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp.2d 1160, 1179 (E.D. Cal. 2006)

> The Supreme Court cases do not suggest that the absence of a statute or an executive agreement is fatal to a foreign policy preemption claim. . . . If Executive Branch statements are competent evidence of what our foreign policy is, the court sees no reason to limit preemption to foreign policy as expressed in statutes or executive agreements.

Steinberg v. International Com'n on Holocaust Era Claims, 133 Cal.App.4th 689, 700-01 & n.14, 34 Cal.Rptr.3d 944, 952-53 & n.14 (Cal. App. 2005) (for

preemption purposes, letter from United States Ambassador suffices as an expression of foreign policy); *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal.App.4th 380, 386 n.4, 392-94, 12 Cal.Rptr.3d 32, 36 n.4 (Cal. App. 2004) (no affirmative federal activity is required for successful invocation of the foreign affairs preemption doctrine).

But other courts have found that *Garamendi* is limited to instances in which there is an executive agreement preempting state law. For example, in *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10 (D.D.C. 2005), Iraqi detainees and spouses of deceased detainees brought an action against two private government contractors who provided interrogators and interpreters to the United States military. The court expressly distinguished *Garamendi* and declared that "[h]ere, unlike in many other reparations cases entangled with political questions, there is no state-negotiated reparations agreement competing for legitimacy with this court's rulings." *Id.* at 16.

Similarly, in *Whiteman v. Dorotheum GmbH & Co., KG*, 431 F.3d 57 (2d Cir. 2005), the court stressed that preemption under *Garamendi* is based on the existence of executive agreements. The court explained:

> Deference to a statement of foreign policy interests of the United States urging dismissal of claims against a foreign sovereign is appropriate where, as here, (1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of those claims; (2) the United

> States Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated that, as a matter of foreign policy, the alternative forum is superior to litigation; and (3) the United States foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of the claims.

Id. at 59-60. *See also Diermenjian v. Deutsche Bank, A.G.*, 526 F.Supp.2d 1068, 1077 (C.D. Cal. 2007) (federal preemption of state statutes may be predicated on "treaties and executive agreements.")

Quite importantly, the Second Circuit's approach — finding preemption in the absence of an executive agreement — is inconsistent with this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). *Medellin* involved a Mexican national who was sentenced to death in Texas for murder. In violation of the Vienna Convention, his home nation's consulate had not been notified. The International Court of Justice ordered the United States to comply with the Vienna Convention and President Bush issued a Memorandum ordering the Texas Courts to comply with this mandate.

This Court held that the Vienna Convention was not enforceable because it was not self-executing and because Congress had not formally executed the treaty. More importantly for this case, the Court found that the President's Memorandum was not binding on Texas. This Court noted that "[t]he claims-settlement cases

involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* at 531. In language directly on point for this case, the Court stated that the "President's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum." *Id.* at 532.

In *Medellin*, this Court made clear that a presidential directive in the absence of an executive agreement or an executed treaty was not sufficient to override state law. This holding is in direct conflict with the Second Circuit's willingness in this case to find preemption based on statements of the Department of Justice in the absence of an executive agreement.[5] This Court should grant review to resolve an issue left open in *Garamendi* and which is dividing the lower courts as to whether preemption based on foreign policy interests can be found in the absence of a statute, treaty, or executive agreement.

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5. Also, in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 332 (2006), this Court expressed that

> [t]he Court's authority to create a judicial remedy applicable in state court must therefore lie, if anywhere, in the treaty itself. . . . But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.

Here, the Second Circuit precluded state claims in the absence of a treaty or an executive agreement, based entirely on letters from the Department of Justice.

C. Does *Garamendi* Apply When the Effect is to Leave the Plaintiffs' With No Possibility of Relief?

Dismissal here, unlike *Garamendi*, will leave the plaintiffs with no recourse at all. The ICHEIC had a December 31, 2003 deadline for accepting claims and thus the ICHEIC process is not available to plaintiffs. The result of the dismissal is to leave the plaintiffs with no possibility of relief. The Second Circuit found that this is irrelevant and declared: "Permitting state-law claims to proceed now that ICHEIC has ceased operations directly conflicts with [the policy goal that it be the exclusive forum and remedy for claims within its purview.]" 592 F.3d at 119.

But there is an enormous difference between finding preemption of state law claims when the effect is to shift them to a different forum and finding preemption of state law claims when the effect is to preclude them entirely because no forum is available.[6] Nothing in

6. Nor is this argument affected by plaintiffs' choice to not file claims in the ICHEIC. When this case was filed in Florida state court in June 2000, the ICHEIC was regarded as voluntary and supplemental, and those who did apply to the ICHEIC were able to reject any offer that was unsatisfactory and were able to then file a claim in court. In 2001, prior this Court's decision in *Garamendi*, Generali moved to dismiss the claims against it on forum non conveniens grounds, claiming that the ICHEIC should be deemed the exclusive remedy. The district court denied this motion holding that ICHEIC was "entirely a creature of six founding insurance companies . . . the decision-making processes [of which] are and can be controlled by the defendants in this case." *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, 228 F.Supp.2d 348, 356-57 (S.D.N.Y. 2002). The litigation thus proceeded in federal court. By the time this suit was dismissed based on *Garamendi* the ICHEIC deadline had closed.

Garamendi suggests that preemption is appropriate in such circumstances, especially in a situation like this where there is no executive agreement with a foreign nation and the foreign nation does not object to the suit.

To leave plaintiffs with no forum for their state law claims and no possibility of relief raises serious constitutional issues. *See, e.g., Reno v. Catholic Social Services*, 509 U.S. 43, 63 (1993); *Oestereich v. Selective Service System, Local Board 11*, 393 U.S. 233, 243-44 (1968) (Harlan, J., concurring) (need to interpret federal laws to ensure availability of forum for claims). This Court has been clear that preclusion of all remedies requires a clear statement from Congress, something obviously not present here. As this Court noted, it is, to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). *See also Medtronic, Inc. v. Lohr*, 518 U.S. at 487. The Second Circuit's opinion thus raises the question of whether letters from the Department of Justice, in the absence of a statute or even an executive agreement, can have the effect of denying plaintiffs access to the courts when that is their only remedy for a serious injustice.

CONCLUSION

This case presents important issues not addressed or resolved in this Court's decision in *American Insurance Association v. Garamendi*. The Second Circuit expansively interpreted *Garamendi* to preclude state common law claims in the absence of an executive agreement and where no other forum or recourse will be available for plaintiffs. The Second Circuit's decision is reflective of confusion in the lower courts as to the proper scope of *Garamendi*, especially in light of subsequent decisions of this Court. This Court should grant review to resolve these important issues.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AND FILED JANUARY 15, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: June 10, 2008 Decided: January 15, 2010)

Docket Nos. 05-5612-cv, 05-5310-cv

In re ASSICURAZIONI GENERALI, S.P.A.

Dr. Thomas Weiss, Erna Birnbaum Gottesman and Martha Birnbaum Younger,

Plaintiff-Appellants,

v.

Assicurazioni Generali, S.p.A.,

Defendant-Appellee.

Edward David, as Personal Representative of the Estate of David David,

Plaintiff-Appellant,

v.

Appendix A

Assicurazioni Generali, S.p.A.,

*Defendant-Appellee.**

LEVAL, *Circuit Judge*:

Plaintiffs Dr. Thomas Weiss, Erna Birnbaum Gottesman, and Martha Birnbaum Younger ("the Weiss Plaintiffs") and Plaintiff Edward David ("David") appeal from the judgment of the United States District Court for the Southern District of New York (Mukasey, *J.*), which dismissed their claims. Plaintiffs are beneficiaries of insurance policies purchased by their ancestors in the years leading up to the Holocaust from Defendant Assicurazioni Generali, S.p.A. ("Generali"), an Italian insurance company. Plaintiffs brought state-law claims alleging breach of the insurance contracts, based on Generali's refusal to pay benefits under those policies. These cases and others were consolidated for pre-trial proceedings. The district court granted Generali's motion to dismiss based on the Supreme Court's decision in *American Insurance Association v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003), which held that the Plaintiffs' state-law claims were preempted by the foreign policy of the United States, which favors resolution of Holocaust-era insurance claims in the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), an international claims resolution organization founded by private insurance companies

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* The Clerk of Court is instructed to amend the official caption as set forth above.

and supported by the United States and other foreign government entities. Because we agree with the district court that *Garamendi* controls this case, we affirm.

BACKGROUND

Generali was founded by Jewish merchants in 1831 in Trieste, Italy. In the time between World War I and World War II, Generali operated in Austria, Hungary, Czechoslovakia, Poland, and Yugoslavia. In the late between-Wars period, many families purchased insurance policies from Generali believing this would provide protection against the rise of Nazi power. According to the complaints, Generali betrayed the policyholders by cooperating with the Nazi regime and refusing to pay the beneficiaries of the insurance policies purchased by Jews and other persecuted minorities.

After World War II, when the victorious Western Allies took steps to reestablish the sovereignty of the defeated Germany, there was a concern that reparations would economically cripple the new Federal Republic of Germany. *Garamendi*, 539 U.S. at 403. In the London Debt Agreement, the allies agreed to "put off consideration of claims arising out of the second World War . . . until the final settlement of the problem of reparation." *Id.* at 403-04 (internal quotation marks and brackets omitted). Notwithstanding this moratorium, the German government paid out over 100 billion Deutsche marks in reparations as of 2000. *Id.* at 404. Those payouts, however, did not cover certain claimants and certain types of claims. *Id.* In 1996, the German

courts interpreted the treaty reunifying East and West Germany as "lifting the London Debt Agreement's moratorium on Holocaust claims by foreign nationals." *Id.* at 405. After this decision, many lawsuits that could not have been brought previously were filed against companies doing business in Germany during the Nazi era.

In July 2000, the United States announced an agreement with Germany in which the German government agreed to enact legislation to establish a foundation that would be used to compensate all victims who suffered at the hands of German companies during the Nazi era. *Id.* In return, the United States agreed that whenever a German company was sued on a Holocaust-era claim in an American (state or federal) court, the government of the United States would submit a statement of interest to the court explaining that "it would be in the foreign policy interests of the United States for the [German] Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Garamendi*, 539 U.S. at 406 (internal quotation marks omitted) (quoting 39 Int'l Legal Materials 1298, 1303 (2000)). The "German Foundation pact" was a model for similar agreements with Austria and France. There was however, no similar agreement with Italy.

With respect to insurance claims, the agreement specified that the German foundation would work with the ICHEIC to handle insurance claims. The ICHEIC was formed in 1998 by "several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners," *id.* at 406-07, to negotiate with European insurers to provide information about unpaid policies issued to Holocaust victims between 1920 and 1945, and to settle any claims that arose in the Holocaust era under these policies, *id.* at 407; ICHEIC, Memorandum of Understanding ¶ 4 (Aug. 25, 1998), *available at* http://www.icheic.org/pdf/ICHEIC_MOU.PDF. To date approximately $300 million dollars have been offered or awarded to more than 48,000 claimants as a result of the ICHEIC process. *See* ICHEIC, http://www.icheic.org (last visited Dec. 17, 2009).

PROCEDURAL HISTORY

The Weiss Plaintiffs filed suit in Florida state court, which Generali removed to federal court. David filed suit in the Eastern District of Wisconsin. Both complaints sought damages for unpaid insurance claims under policies issued by Generali between 1920 and 1941. In November 2000, these suits, together with numerous others, were transferred by the Judicial Panel on Multidistrict Litigation to the district court for the Southern District of New York for consolidated pre-trial proceedings. In an initial opinion, issued prior to the Supreme Court's decision in *Garamendi*, the district court denied Generali's motion to dismiss on *forum non*

conveniens grounds. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348 (S.D.N.Y. 2002).

In 2003, the Supreme Court decided *Garamendi*. In that case, a trade association and a group of insurance companies, including Generali, brought suit seeking to enjoin enforcement of California's Holocaust Victim Insurance Relief Act ("HVIRA"), which required insurers to disclose the details of insurance policies sold in Europe between 1920 and 1945 or face suspension of its license to do business in the state. *Garamendi*, 539 U.S. at 409-10. The United States filed an *amicus* brief stating as its foreign policy that the ICHEIC should be the exclusive remedy for insurance claims based on policies from the Holocaust era. Brief of the United States as *Amicus Curiae* Supporting Petitioners at 2-3, *Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (No. 02-722), 2003 WL 721754. The Supreme Court ruled that the HVIRA interfered with and was therefore preempted by the foreign policy of the United States to "encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information." *Id.* at 421.

Relying on *Garamendi*, the district court dismissed all actions in October 2004. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494 (S.D.N.Y. 2004). Each plaintiff filed a separate appeal. The class action plaintiffs in the consolidated proceedings entered into a settlement agreement with

Generali.[1] We then stayed all the remaining appeals. *In re Assicurazioni Generali, S.p.A.*, No. 05-5602-cv *et al.* (2d Cir. Sept. 11, 2006) (order). In November 2007, we lifted the stay on the appeals by the plaintiffs in the nineteen remaining non-class action cases. *In re Assicurazioni Generali S.p.A.*, No. 04-6161-cv *et al.* (2d Cir. Nov. 7, 2007) (order).

After oral argument, we requested the advice of Secretary of State Condoleezza Rice "on the question whether court adjudication of [the] Holocaust era claims against Generali would conflict with the foreign policy of the United States." *In re Assicurazioni Generali S.p.A.*, No. 05-5602-cv *et al.* (2d Cir. Aug. 1, 2008) (letter). The Government responded that "[i]t has been and continues to be the foreign policy of the United States that the [ICHEIC] should be regarded as the exclusive forum and remedy for claims within its purview" and that claims against Generali, as "one of the original ICHEIC companies and an active participant in its operations, fall within the category United States policy seeks to address." Letter of Sharon Swingle, Oct. 30, 2008 ("Swingle Letter"), at 1. Because of the possibility of change of foreign policy after the intervening change of administration in 2009, we then inquired of the new Secretary of State Hillary Rodham Clinton whether, in the new administration, the foreign policy of the United States continued unchanged, *In re Assicurazioni*

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1. After further proceedings, approval of that settlement was affirmed by our court. *Rubin v. Assicuazioni Generali S.p.A.*, 290 F. App'x 376 (2d Cir. 2008).

Generali S.p.A., Nos. 05-5612-cv, 05-5310-cv (2d Cir. July 29, 2009) (letter), and received a response that the position of the United States "continues to be that set out in [its] original letter brief," Letter of Benjamin M. Shultz, Oct. 27, 2009 ("Shultz Letter"), at 1. In March 2009, all plaintiffs other than the Weiss Plaintiffs and David settled with Generali, and their appeals were dismissed. *In re Assicurazioni Generali S.p.A.*, No. 05-5612-cv *et al.* (2d Cir. Mar. 6, 2009) (order).

DISCUSSION

We review *de novo* a district court's application of preemption principles. *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103, 106 (2d Cir. 2009).

I. Applicability of *Garamendi*

In *Garamendi*, the Supreme Court explained that state law "must give way" to the foreign policy of the United States, as set by the President, where there is "evidence of clear conflict between the policies adopted by the two." *Garamendi*, 539 U.S. at 420-21. Based on the *amicus* brief of the United States and statements made during negotiations between the United States and Germany, Austria, and France regarding Holocaust-era insurance claims, the Court concluded that the "consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions," and, in the insurance context specifically, "to encourage European insurers to work

with the ICHEIC to develop acceptable claim procedures." *Id.* at 421.

California's HVIRA. "by making exclusion from a large sector of the American insurance market the automatic sanction for noncompliance with the State's own policies on disclosure," which required broader disclosure than the ICHEIC, "undercut[] the President's diplomatic discretion and the choice he . . . made in exercising it." *Id.* at 423-24. Because enforcement of the California law would mean that the President could not wield the full "'coercive power of the national economy'" as a tool of diplomacy in negotiating a process for settling claims, the Court concluded that the HVIRA "'compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments' to resolve claims against European companies arising out of World War II." *Id.* at 424 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377, 381, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)).

Garamendi involved only disclosure requirements. The HVIRA's disclosure requirement, although not directly in conflict with government's policy to encourage use of the ICHEIC to resolve Holocaust-era insurance claims, nonetheless undermined the Government's objective by "thwarting the Government's policy of repose for companies that pay through the ICHEIC" and by undercutting privacy protections of European allies. *Id.* at 425. The Court therefore found it sufficiently disruptive to justify preemption. The cases

before us, in contrast, essentially seek enforcement of the plaintiffs' claimed contract rights against Generali under state law. Unlike the HVIRA's disclosure requirement, whose effect on foreign policy is only oblique, such law suits are *directly* in conflict with the Government's policy that claims should be resolved exclusively through the ICHEIC. If, as the Supreme Court held in *Garamendi*, a state disclosure requirement conflicts sufficiently to be preempted by the national foreign policy of channeling Holocaust-era insurance claims through the ICHEIC, then, *a fortiori*, a state law suit to enforce a Holocaust-era insurance claim is preempted by that policy, as well.

Plaintiffs put forward several arguments in an effort to distinguish *Garamendi*. First, they point out that Generali is an Italian company and that Italy, unlike Germany, Austria, and France, has not entered an executive agreement with the President of the United States regarding the processing of Holocaust-era insurance claims. The Court in *Garamendi*, however, did not find that the United States policy of encouraging resolution of Holocaust-era insurance claims through the ICHEIC depended on the existence of executive agreements. Rather, the Court viewed the executive agreements as the product of the policy. The agreements, and statements of interest issued by the Government pursuant to them, illustrate or express the national position, rather than define it. *See, e.g., id.* at 421-22 (stating that the agreements "illustrate" and "express[]" the President's policy, and quoting statements of officials regarding the policy underlying

the agreements, in describing "evidence" of the policy). A further indication that the Court did not view the existence of an executive agreement as a prerequisite is that Generali was one of the plaintiffs in *Garamendi*, and was not excluded from the judgment on the ground that it is an Italian company and Italy is not party to an executive agreement.[2]

In any event, to erase any such doubt, we solicited the advice of the Secretary of State (in two administrations) on the foreign policy of the United States. The Government has twice made perfectly clear that "[i]t has been and continues to be the foreign policy of the United States that the [ICHEIC] should be regarded as the exclusive forum and remedy for claims within its purview," and that this policy applies to claims against Generali. Shultz Letter at 1; Swingle Letter at 1.

Plaintiffs next argue that strong state interests underlie the laws that form the basis for their suit, and therefore, unlike in *Garamendi*, the balance between state and federal policy tips in their favor. This argument is premised on a misunderstanding of *Garamendi* and preemption law. As the *Garamendi* Court reaffirmed, "[an] express federal policy and [a] clear conflict raised by [a] state statute are alone enough to require state

2. We find nothing inconsistent with this position in the reference in *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008), to "cases in which [the Supreme Court] has upheld the authority of the President to settle foreign claims pursuant to an executive agreement." *Id.* at 1371.

law to yield." *Garamendi*, 539 U.S. at 425. The Court went on to note that, if the conflict were less clear, it would nevertheless be resolved in the federal government's favor because of the weakness of the state's interest in regulating disclosure of Holocaust-era insurance policies. *Id.* In this case, the conflict between the federal policy that the ICHEIC should be the exclusive forum for resolving Holocaust-era insurance claims and Plaintiffs' attempt to adjudicate their Holocaust-era insurance claims under state law is even more clear than the conflict in *Garamendi*, which involved only a disclosure requirement, and not a state law suit to enforce the insurance claim. The state law must yield to the federal policy, regardless of the importance of the interests behind the state law.

Finally, Plaintiffs point out that the ICHEIC's December 31, 2003 deadline for accepting claims has passed, so that dismissal of their claims will deny them the opportunity to pursue those claims in any forum. This argument is premised on a misunderstanding of the Government's policy. As the Government made clear in its letters to the court, "[i]t was never the foreign policy of the United States that claims should merely be held in abeyance pending conclusion of the ICHEIC process." Swingle Letter, at 8. The policy is rather that the ICHEIC "should be regarded as the *exclusive* forum and remedy for claims with its purview." *Id.* at 1 (emphasis added). Permitting state-law claims to proceed now that ICHEIC has ceased operations directly conflicts with that policy goal. *See id.* at 8 ("[I]t would undermine future efforts to secure voluntary

compensation agreements if ICHEIC participants became subject to litigation as soon as ICHEIC had concluded."); Shultz Letter, at 5. If the ICHEIC door has closed on plaintiffs, it is because they chose to allow it to close.[3]

Accordingly, we hold under authority of *Garamendi* that Plaintiffs' claims, which fall within the scope of the ICHEIC process, are preempted by the foreign policy of the United States.

II. The Weiss Plaintiffs' Motion to Amend

The Weiss Plaintiffs argue that the district court erred in denying their motion after judgment to amend their complaint to add a claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* The filing of an amended complaint is not permissible once a judgment is entered unless the judgment is set aside or vacated pursuant to Rule 59 of the Federal Rules of Civil Procedure. *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d Cir. 1991). A district court's denial of a Rule 59 motion to alter or amend a judgment is reviewed for abuse of discretion. *See State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418

3. In any event, it is apparently not entirely correct that the ICHEIC process is closed. The Government's letter informs us that Generali and other ICHEIC participants have agreed to continue processing claims according to the relaxed standards of proof developed by the ICHEIC. Shultz Letter, at 4-5.

(2d Cir. 1990). When the plaintiff had the opportunity to amend the complaint earlier but waited until after judgment, a court may "exercise its discretion more exactingly." *Id.* Generally, district courts will only amend or alter a judgment pursuant to Rule 59 "to correct a clear error of law or prevent manifest injustice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (internal quotation marks omitted).

The Weiss Plaintiffs give no good reason for failing to seek leave to amend earlier in the case. Indeed, the record indicates that they contemplated adding a RICO claim at least three years before the court entered judgment. The district court acted well within its discretion in denying the motion.

III. David's Allegation of a Cancelled Policy

In his brief on appeal, David contends that his complaint shows that his ancestor's insurance policy was "cancelled prior to the Holocaust Era as that era is defined by the ICHEIC rules" and therefore his claim was not eligible for adjudication by the ICHEIC. Although the ICHEIC generally covers claims based on policies sold between 1920 and 1945, it does not cover claims based on policies that were cancelled prior to the start of the "Holocaust era" as defined in its claims-processing rules. *See* ICHEIC, Processing Guide, at 32, 46 (June 22, 2003), *available at* http://www.icheic.org/pdf/ICHEIC_CPG.pdf. The ICHEIC Processing Guide identifies the start of the Holocaust era in Poland, where David's ancestor lived, as 1939. *Id.* at 51. The United

States, in its first letter to this court, noted that adjudication of a lawsuit arising out of an insurance policy cancelled before the Holocaust era (as defined by the ICHEIC) does not conflict with foreign policy. Swingle Letter, at 9 n.5.

David's complaint is unclear as to potentially determinative aspects of the timing of his ancestor's death and the duration of the insurance policy. The complaint alleges that David's insured ancestor "died in a concentration camp as the result of actions of Nazi Germany" and that "the policy was in full force and effect and all premiums were current at the time of his death," while also alleging that Generali advised David in 1999 that the policy was cancelled "sometime prior to 1936." There is no clear allegation that David's claim falls outside the Holocaust era as defined by the ICHEIC and therefore was not subject to adjudication by that body. Accordingly, we affirm the district court's dismissal of the complaint. On the other hand, it may be that the claim, although inartfully pleaded, in fact falls outside the scope of the ICHEIC process. We instruct the district court to permit David to replead if, consistent with the requirements of Rule 11 of the Federal Rules of Civil Procedure, he is able to plead a claim that falls outside the scope of the ICHEIC.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court. With respect to Plaintiff David, the district court is instructed to permit the filing of an amended complaint, if the new pleading conforms to the requirement set forth in this opinion.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 14, 2004

United States District Court,
S.D. New York.

No. MDL 1374.

No. M21-89MBM.

In re: ASSICURAZIONI GENERALI S.P.A. HOLOCAUST INSURANCE LITIGATION

This Disposition Applies to All Actions.

Oct. 14, 2004.

OPINION AND ORDER

MUKASEY, District Judge.

Plaintiffs in twenty separate actions have sued Assicurazioni Generali S.p.A. ("Generali"), an Italian insurer that wrote insurance policies in Europe in the years before and during World War II.[1] The gravamen

1. Of the twenty actions, two were filed initially in this court: *Cornell v. Assicurazioni Generali S.p.A.*, 97 Civ. 2262 (class action); and *Schenker v. Assicurazioni Generali S.p.A.* (formerly *Winters v. Assicurazioni Generali*), 98 Civ. 9186 (class action). Sixteen were transferred to this court by the Panel on (Cont'd)

of the actions is that Generali failed to pay benefits following the death of the policy holders or damage to their property during the German campaign of genocide known as the Holocaust. Plaintiffs, assertedly the policy beneficiaries or their surviving family members, have advanced numerous claims seeking damages for Generali's non-payment of benefits, as well as ancillary claims predicated on other alleged misconduct. The claims arise under the statutes and common law of New York, Wisconsin, Florida, and California, as well as

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(Cont'd)
Multidistrict Litigation ("MDL Panel") under Docket No. 1374: *Brauns v. Assicurazioni Generali S.p.A.*, 00 Civ. 9412; *Smetana v. Assicurazioni Generali S.p.A.*, 00 Civ. 9413 (class action); *Mandil v. Assicurazioni Generali S.p.A.*, 00 Civ. 9414; *Weiss v. Assicurazioni Generali S.p.A.*, 00 Civ. 9415; *David v. Assicurazioni Generali S.p.A.*, 00 Civ. 9416; *Szekeres v. Assicurazioni Generali S.p.A.*, 01 Civ. 0158; *Lightner v. Assicurazioni Generali S.p.A.*, 01 Civ. 0160; *Sladek v. Assicurazioni Generali S.p.A.*, 01 Civ. 6193; *Haberfeld v. Assicurazioni Generali S.p.A.*, 01 Civ. 9498 (class action); *Lantos v. Assicurazioni Generali S.p.A.*, 03 Civ. 6356; *More v. Assicurazioni Generali S.p.A.*, 03 Civ. 6358; *Pioro v. Assicurazioni Generali S.p.A.*, 03 Civ. 6359; *Sorter v. Assicurazioni Generali S.p.A.*, 03 Civ. 636; *Ungar v. Assicurazioni Generali S.p.A.*, 03 Civ. 6193; *Weiss/Friedman v. Assicurazioni Generali S.p.A.*, 03 Civ. 6360; and *Zada v. Assicurazioni Generali S.p.A.*, 03 Civ. 6355. *Anderman v. Federal Republic of Austria*, 02 Cv. 8379 (class action), was transferred by the MDL Panel to this court under Docket No. 1337. *Tabaksman v. Assicurazioni Generali S.p.A.*, 01 Civ. 7826, was removed to this court from New York State Supreme Court.

customary international law.[2] A list of the claims is set forth in the Appendix at the end of this opinion.

Generali previously moved to dismiss on grounds of *forum non conveniens* and contractual forum selection. In connection with that motion, Generali argued, *inter alia*, that the balance of conveniences required dismissal of the actions in favor of the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), a private commission established by several European insurance companies (including Generali), certain nongovernmental Jewish organizations, the State of Israel, and domestic state insurance regulators, to resolve unpaid Holocaust-era insurance claims. I denied **Generali's** motion by opinion and order dated September 25, 2002, finding, with respect to the application to dismiss the actions in favor of ICHEIC, that that body is an inadequate alternative forum for litigation of plaintiffs' claims. *See In re Assicurazioni* **Generali** S.p.A. Holocaust Insurance Litig., 228 F.Supp.2d 348, 355-58 (S.D.N.Y.2002) (hereinafter, *"http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&Find*

2. Plaintiffs in the *Cornell, Schenker,* and *Tabaksman* actions allege also violations of "international treaties" (*Cornell* Compl. ¶¶ 49-51; *Schenker* Compl. ¶¶ 64-66; Tabaksman Compl. ¶¶ 39-41), but fail to identify in their respective complaints the treaties upon which the alleged violations are premised. Nor do their motion papers address independent violations of international treaties. Accordingly, plaintiffs' claims premised on Generali's violations of international treaties are deemed abandoned.

*Type=Y&Serial Num=2002614092*Generali *I*"). Familiarity with *Generali* I is assumed for present purposes.[3]

With the court's permission, Generali now moves to dismiss or strike, and/or for judgment, on various additional grounds. In light of the Supreme Court's decision in *American Insurance Association v.* Garamendi, 539 U.S. 396, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003), it appears that the laws supporting litigation of plaintiffs' benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC. Plaintiffs' ancillary claims, in turn, are not actionable because it appears that they do not allege any cognizable injury other than that caused by Generali's non-payment of benefits, redress for which is committed to ICHEIC. Accordingly, Generali's motion to dismiss is granted with respect to all actions.

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3. The MDL Panel transferred the *Lantos, More, Pioro, Sorter, Ungar, Weiss/Friedman,* and *Zada* actions, and the portion of *Anderman* alleging claims against Generali, to this court after *Generali* I was issued (*see* Docket Nos. 52, 100), and thus those actions are not referenced in my earlier opinion. Claims against other defendants in *Anderman* were transferred to the Central District of California and subsequently dismissed by that Court. *See Anderman v. Federal Republic of Austria,* 256 F.Supp.2d 1098, 1116 (C.D.Cal.2003).

Appendix B

I.

A. *Facts in* Garamendi

At issue in *Garamendi* was the constitutionality of a California statute, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), which imposed disclosure requirements on all insurers operating in that state that sold insurance policies to persons in Europe between 1920 and 1945. 123 S.Ct. at 2383-84 (citing Cal. Ins.Code Ann. § 13804(a) (West Cum.Supp.2003)). HVIRA required each such insurer to report to the California insurance commissioner how many policies it had issued during the relevant period, the current status of each policy, and the names of the beneficiaries, and directed the insurance commissioner to place the information in a central public registry. *Id.* (citing Cal. Ins.Code Ann. §§ 13803, 13804(a)). The mandatory penalty for default was suspension of the insurer's license to do business in the State. *Id.* (citing Cal. Ins.Code Ann. § 13806).

The *Garamendi* plaintiffs, an insurance industry trade association and several insurance companies, sued to enjoin enforcement of HVIRA, arguing, *inter alia*, that the statute interfered with the foreign policy of the United States, implemented by the Executive Branch, as expressed principally although not exclusively in certain executive agreements between the President and the leaders of Germany, France, and Austria. *Id.* at 2386. These agreements were the result of efforts at the national level to achieve a mediated settlement of numerous Holocaust-related lawsuits filed in this

country's courts against companies doing business in Germany during the Nazi era. *Id.* at 2381.

The Court's discussion of the executive agreements focused primarily on the agreement with Germany, the Agreement Concerning the Foundation "Remembrance, Responsibility and the Future" (the "German Foundation Agreement"). Pursuant to that agreement, the German government and German companies undertook to contribute 10 billion deutschmarks to the German Foundation, a fund used to compensate persons "who suffered at the hands of German companies during the National Socialist era." *Id.* at 2381 (quoting German Foundation Agreement, July 17, 2000, U.S.-F.R.G., 39 Int'l Legal Materials ("I.L.M.") 1298, 1298 (2000)). In exchange, the United States government (the "Government") agreed to file in all cases involving Holocaust-era claims against German companies a statement of interest expressing the view that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Id.* at 2382 (quoting German Foundation Agreement, 39 I.L.M. at 1303). Although the Government declined to guarantee that its foreign policy interests would "in themselves provide an independent legal basis for dismissal," it agreed to tell courts "that U.S. policy interests favor dismissal on any valid legal ground." *Id.* (quoting German Foundation Agreement, 39 I.L.M. at 1304). The Government pledged also to use its "best efforts, in a

manner it considers appropriate," to persuade state and local governments to respect the German Foundation as the exclusive mechanism for resolving Holocaust-era claims against German companies. *Id.* (quoting German Foundation Agreement, 39 I.L.M. at 1300, 1303-04).

As to insurance claims specifically, the United States and Germany "agreed that the German Foundation would work with the [ICHEIC]," and Germany stipulated that such claims would be processed in accordance with procedures negotiated with ICHEIC. *Id.* at 2382. In a supplemental agreement, the German Foundation agreed to set aside funds for claims against German insurers approved by ICHEIC, to contribute additional sums to a humanitarian fund administered by ICHEIC, and to work with German insurers that had joined ICHEIC to publish lists of holders of insurance policies issued by German companies who may have been Holocaust victims. *Id.* at 2383 (citations omitted).

The German Foundation Agreement served as the model for similar agreements with France and Austria, although the agreement with France did not address separately the matter of insurance claims. *Id.* at 2383 n. 3.[4]

4. The executive agreements with Austria and France are: the Agreement between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation"; the Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and (Cont'd)

B. *The Court's Ruling*

The Court ruled that HVIRA was preempted by an Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC.

In reaching this conclusion, the Court began by describing the federal government's supremacy over the States in conducting the Nation's foreign policy and, within the federal government, the President's predominant role in formulating that policy. *Id.* at 2386 ("There is . . . no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy. . . . Nor is there any question generally that there is executive authority to decide what that policy should be."). Consistent with this allocation of power in the realm of foreign affairs, the Court had upheld in previous cases the President's authority to make executive agreements with other countries that settled individual claims filed against foreign governments.

> Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice. . . . Given the fact that the practice

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(Cont'd)

Cooperation"; and the Agreement Between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffering During World War II. *See Garamendi*, 123 S.Ct. at 2383 n. 3.

> goes back over 200 years to the first Presidential administration, and has received congressional acquiescence throughout its history, the conclusion "[t]hat the President's control of foreign relations includes the settlement of claims is indisputable."

Id. at 2387 (quoting *United States v. Pink*, 315 U.S. 203, 240, 62 S.Ct. 552, 86 L.Ed. 796 (1942)) (Frankfurter, J., concurring) (additional citations omitted). The Court reasoned that this executive power to settle claims against foreign governments extends also to claims brought against foreign companies because drawing "a sharp line between public and private acts . . . in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies." *Id.* The Court thus concluded that "[g]enerally, valid executive agreements are fit to preempt state law, just as treaties are. . . ." *Id.* at 2387-88 (citing *United States v. Belmont*, 301 U.S. 324, 327, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); *Pink*, 315 U.S. at 223, 62 S.Ct. 552).

The Court next observed that resolving Holocaust-era insurance claims is a matter "well within the Executive's responsibility," inasmuch as the claims implicated the Nation's foreign affairs. *Id.* at 2390.

> Since claims remaining in the aftermath of hostilities may be "sources of friction" acting as an "impediment to resumption of friendly relations between the countries

> involved," . . . there is a longstanding practice of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries. . . . The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War. Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state interests are overriding, and which the National Government has addressed.

Id. (citations omitted).

Turning to the constitutionality of HVIRA, the Court held that the statute was preempted by an executive policy reflected in the executive agreements with Germany, Austria and France, and in various statements by Executive Branch officials. With respect to Holocaust claims generally, the Court found in the "negotiations toward the three settlement agreements," a "consistent Presidential foreign policy" of "encourag[ing] European governments and companies to volunteer settlement funds in preference

to litigation or coercive sanctions." *Id.* at 2390, 123 S.Ct. 2374. With respect to insurance claims specifically, the Court found that "the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with ICHEIC to develop acceptable claim procedures, including procedures governing disclosures of policy information." *Id.* (citing provision in German Foundation Agreement declaring German Foundation to be "exclusive forum" for demands against German companies and agreeing to have insurance claims resolved through proceduresnegotiated with ICHEIC; and same in agreement with Austria). The Court observed further that "this position, of which the agreements are exemplars, has also been consistently supported in the high levels of the Executive Branch," and cited statements by Deputy Treasury Secretary Stuart Eizenstat, the Government's principal representative on Holocaust issues in the Clinton administration, and Ambassador Randolph Bell, Special Envoy for Holocaust issues in the Bush administration, to the effect that ICHEIC is the only effective means of processing unpaid Holocaust-era insurance claims quickly and completely and thus should be considered the "exclusive remedy" for resolving such claims. *Id.* at 2390-91. Here, the Court explicitly rejected the view, expressed by the dissent, that Executive Branch statements by sub-Cabinet level officials are insufficient as a basis for determining the Executive Branch's position. *See id.* at 2391 n. 13 (noting that "[t]here is no suggestion that these high-level executive officials were not faithfully representing the

President's chosen policy, and there is no apparent reason for adopting [a] 'nondelegation' rule to apply within the Executive Branch").

In contrast to the executive policy favoring voluntary settlement of Holocaust-era claims through ICHEIC, the Court found that the California legislature, in enacting HVIRA, "ha[d] taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail." *Id.* at 2391. By reducing the President's economic and diplomatic leverage, HVIRA's disclosure requirement "'compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments' to resolve claims against European companies arising out of World War II." *Id.* at 2391-92 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000)). Although HVIRA and the Executive Branch shared the goal "of obtaining compensation for Holocaust victims," the statute was "an obstacle to the success of the National Government's chosen 'calibration of force' in dealing with the Europeans using a voluntary approach." *Id.* at 2392 (quoting *Crosby*, 530 U.S. at 380, 120 S.Ct. 2288). The Court concluded:

> The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that if the matter

> of compensation were considered in isolation from all other issues involving the European allies, the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress. The question relevant to preemption in this case is conflict, and the evidence here is "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives."

Id. at 2393 (quoting *Crosby*, 530 U.S. at 386, 120 S.Ct. 2288) (alteration in *Garamendi*).

II.

The Supreme Court's decision in *Garamendi* compels dismissal of plaintiffs' claims seeking damages for Generali's non-payment of policy benefits. The dispositive force of the ruling is most evident in relation to plaintiffs' benefits claims arising under state Holocaust statutes, like HVIRA, designed to foster litigation of Holocaust-era insurance claims. *Cf.* Tex. Atty. Gen. Op. GA-0116, 2003 WL 22451383, at *6 (Oct. 20, 2003) (concluding on basis of *Garamendi* that Texas statute featuring "virtually identical provisions" to HVIRA "interferes with the President's conduct of foreign affairs, and is thus

preempted by the United States Constitution").[5] However, the Court's decision requires dismissal also of the benefits claims arising under generally applicable state statutes and common law as well as customary international law. Litigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of such claims through ICHEIC. The salient fact for present purposes is that plaintiffs seek to obtain redress for Generali's non-payment of policy benefits by filing lawsuits in this country's courts; the legal justification for such claims is irrelevant. *Cf. Boyle v. United Technologies Corp.*, 487 U.S. 500, 508, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) (noting that in some cases where uniquely federal interest displaces state law, "the entire body of state law applicable to the area conflicts and is replaced by federal rules") (citing *Clearfield Trust v. United States*, 318 U.S. 363, 366-67, 318 U.S. 744, 63 S.Ct. 573, 87 L.Ed. 838 (1943)). In short, following *Garamendi*, it appears that plaintiffs cannot use the courts to obtain recovery of benefits due under Holocaust-era policies, regardless of the theory of recovery.

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5. Plaintiffs assert claims under HVIRA (*Anderman* Compl. ¶¶ 462-74) and Florida's Holocaust Victims Insurance Act, Fla. Stat. § 626.9543 (Cum.Supp.2003) (*Weiss* Compl. ¶¶ 123-34). In addition, plaintiffs in the *Cornell* and *Schenker* actions borrow from certain provisions in New York's Holocaust Victims Insurance Act of 1998, N.Y. Ins. Law §§ 2701-11 (Consol.2000), in alleging unfair business practices. (*Cornell* Compl. ¶¶ 83-84; *Schenker* Compl. ¶¶ 102-03); In *Garamendi*, the Court listed the New York and Florida statutes, among others not implicated in this litigation, as being "similar to HVIRA." 123 S.Ct. at 2385 n. 6.

Appendix B

There is little question that an executive policy can have such broad preemptive effect over the laws on which plaintiffs' benefits claims are based. As discussed above, the Court observed in *Garamendi* that resolving Holocaust-era insurance claims is a matter "well within the Executive's responsibility for foreign affairs," and that that responsibility includes the power to settle claims against foreign companies pending in this country's courts. 123 S.Ct. at 2387, 2390. More generally, the Supreme Court has endorsed repeatedly, including in *Garamendi*, the notion of executive primacy in the sphere of foreign affairs. *See, e.g., Garamendi*, 123 S.Ct. at 2386 (noting that "the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations' ") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring)); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (the President has "unique responsibility" for the conduct of "foreign and military affairs"); *Dep't of the Navy v. Egan*, 484 U.S. at 518, 529 (1988) (noting "the generally accepted view that foreign policy [is] the province and responsibility of the Executive") (quoting *Haig v. Agee*, 453 U.S. 280, 293-94, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981)); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109, 68 S.Ct. 431, 92 L.Ed. 568 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in

foreign affairs. . . ."); *United Statesv. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936) (1936) (referring to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations-a power which does not require as a basis for its exercise an act of Congress").

Certain plaintiffs argue that giving such broad preemptive effect to the executive policy favoring ICHEIC resolution is improper because "the wholesale destruction of [their] claims implicates constitutionally protected due process, property, and contract rights." (Surreply of Plaintiffs Lantos, More, Pioro, Sorter, Ungar, Weiss-Friedman, and Zada (hereinafter, "Surreply of Plaintiffs Lantos et al."), at 7-8) They point to a footnote in *Garamendi* stating that executive preemption of state law is "subject . . . to the Constitution's guarantees of individual rights." (*Id.* at 7 (quoting *Garamendi*, 123 S.Ct. at 2387 n. 9)). To be sure, it is a "well-established" principle in epreemption doctrine that " 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.' " *Boos v. Barry*, 485 U.S. 312, 324, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (quoting *Reid v. Covert*, 354 U.S. 1, 16, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957)). However, to assert this general principle, without more, is merely to raise the question of whether executive preemption of state laws on which plaintiffs rely causes constitutional harm; it does not settle that inquiry in plaintiffs' favor. In view of the President's

settled authority to extinguish legal claims that have a bearing on the Nation's foreign relations, discussed above, plaintiffs' objection fails. Thus, whatever the 'individual rights' limitations on executive preemption intended by the *Garamendi* footnote, no such rights are implicated in holding that the state laws under which plaintiffs' benefits claims arise are preempted by the executive policy favoring ICHEIC resolution.[6]

Nor is there any serious doubt that the executive policy favoring ICHEIC resolution of Holocaust-era insurance claims extends to claims against Generali in particular. The *Garamendi* opinion refers generally to

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6. Nothing here forecloses the possibility that enforcement of the executive policy favoring ICHEIC resolution causes a taking of property without just compensation, thus violating the Fifth Amendment of the United States Constitution. Plaintiffs may decide at the appropriate time to bring a "taking" action in the Court of Federal Claims. *See Dames & Moore v. Regan*, 453 U.S. 654, 688-89, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (where President suspended plaintiffs' claims against Iran in favor of claims tribunal, holding that parties whose valid claims were not adjudicated or not fully paid may bring a "taking" claim against United States in the Court of Claims). *Cf. McKeel v. Islamic Republic of Iran*, 722 F.2d 582,590 (9th Cir.1983), *cert. denied*, 469 U.S. 880, 105 S.Ct. 243, 83 L.Ed.2d 182 (1984) (declining to hold that Claims Settlement Agreement with Iran was invalid because it took appellants' property rights, on ground that "the availability of redress in the Claims Court satisfies the constitutional requirement of an adequate provision for compensation") (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 122-36, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)).

"European insurers" in describing the policy at issue, *see* 123 S.Ct. at 2390 ("As for insurance claims in particular, the national position . . . has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures . . . ."), and nowhere distinguishes between Generali and other European insurers that wrote Holocaust-era policies. This is significant because Generali was one of the petitioners in *Garamendi* and the respondent, the California insurance commissioner, referred to Generali repeatedly in its briefs and at oral argument. (*See*excerpts from Respondent's Briefs and Transcript of Oral Argument, Generali's Response to Plaintiffs' Surreply Memoranda Ex. 3, *passim*) Moreover, Generali arguably is the most prominent insurance company defendant in Holocaust-era lawsuits filed in U.S. courts. *See* Michael Bazyler, Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry, 28 Brooklyn J. Int'l Law 683, 705 (2003) (describing Generali as "[t]he European insurance company with the most notoriety in the field of Holocaust-era restitution"); Michael Bazyler, Nuremberg in America: Litigating the Holocaust in United States Courts, 34 U. Rich. L.Rev. 1, 97 n. 388 (2000) ("Because Generali was the largest seller of insurance to Jews prior to World War II, it is listed as either the lead or only defendant in most of the Holocaust-era insurance lawsuits filed in the United States. It has now become well-known in the arena of human rights litigation and among the American Jewish community."). In view of Generali's involvement in *Garamendi* and its significant role in Holocaust-era

litigation generally, the lack of any articulated "Generali exception" in the Court's opinion strongly suggests that the executive policy favoring ICHEIC resolution applies equally to Generali and other European insurers that wrote Holocaust-era policies.

Additional support for the conclusion that the executive policy encompasses claims against Generali may be found in Executive Branch statements promoting ICHEIC resolution as the exclusive remedy for all Holocaust-era insurance claims. For example, in a November 2000 letter from Deputy Secretary Eizenstat to ICHEIC Chairman Eagleburger, the Deputy Secretary acknowledged Generali's agreement to make a contribution to ICHEIC for payment of Holocaust-era insurance claims and "commend[ed] the ICHEIC's untiring efforts to provide a measure of justice to Holocaust survivors and their heirs." (Nov. 28, 2000 Eizenstat Ltr., Generali's Response to Plaintiffs' Surreply Memoranda Ex. 1) In the same letter, the Deputy Secretary observed:

> The U.S. government has supported ICHEIC since its inception in 1998 and believes it should be recognized as the exclusive remedy for resolving all insurance claims that relate to the Nazi era. ICHEIC helps further the United States' interest in maintaining good relations with Israel and with Western, Central and Eastern European nations from which many of the [sic] those who suffered during the Nazi era and World War II come.

(*Id.*) This letter, expressing no hint of a distinction between Generali and other European insurers, suggests that claims against Generali are within the scope of the executive policy.

This conclusion is buttressed by other unequivocal pronouncements of the executive policy cited in the *Garamendi* opinion, *see* 123 S.Ct. at 2390-91 (citing, *inter alia*, Hearing before the Committee on House Banking and Financial Services, 106th Cong., 2d Sess., 173 (2000) (Eizenstat statement that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era"); Hearings on H.R. 2693 before the Subcommittee of Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform, 107th Cong., 2d Sess., 24 (2002) (Bell statement to the same effect); Hearing on the Legacies of the Holocaust before the Senate Committee on Foreign Relations, 106th Cong., 2d Sess., 23 (2000) (Eizenstat testimony that a company's participation in ICHEIC should give it " 'safe haven' from sanctions, subpoenas, and hearing relative to the Holocaust period"),[7] as well as numerous submissions to this court. (*See, e.g.*, Sept. 16, 2003 Hearing before the House Committee on Govt. Reform, Generali's Response to Plaintiffs' Surreply Memoranda Ex. 2, at 3 (Bell testimony that "ICHEIC process enjoys today the full

7. Generali was one of the founding members, and remains a member, of ICHEIC.

support of survivors' groups, of major Jewish-American NGOs, and of the Government of Israel, as well as of the Administration")); Nov. 13, 2001 Ltr. from James Bindenagel, Department of State Special Envoy for Holocaust Issues, to William Shernoff, Surreply of Plaintiffs Lantos et al., Ex. B, at 1 ("As a matter of policy, the United States Government believes that the resolution of Nazi-era restitution and compensation matters, including those related to insurance, should be handled through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation. Our longstanding policy of support for ICHEIC is based on U.S. interests in obtaining a measure of justice for victims, while preserving and protecting our political and economic relations with our European friends and allies and the State of Israel."); Jun. 18, 2001 Ltr. from Deputy Secretary Richard Armitage to Eagleburger, Simshauser Decl. in Support of Generali's Motion to Dismiss, filed in *Anderman* action, Ex. 2 ("I am pleased to affirm that oftlinethe United States government continues to support the ICHEIC and believes it should be viewed as the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II .... ICHEIC helps further U.S. interests by fostering good relations with and among our European allies and the State of Israel."); Hearing before the German Bundestag Committee on Domestic Affairs, Berlin, Feb. 16, 2000, Simshauser Decl. in Support of Generali's Motion to Dismiss, filed in *Anderman* action, Ex. 1, at 14 (Eizenstat testimony same as that before Hearing on the Legacies of the Holocaust, cited *supra*))

Appendix B

Plaintiffs argue that the executive agreements at issue in *Garamendi* do not address claims against Generali, and stress that the United States and Italy have not entered into a comparable agreement governing such claims. (Plaintiffs' Joint Opp'n to Generali's Second Motion to Dismiss at 72; Plaintiffs' Joint Surreply in Opp'n to Generali's Second Motion to Dismiss at 2-4; *Anderman* Plaintiffs' Opp'n to Generali's Motion to Dismiss at 6) However, the *Garamendi* ruling strongly implies that an executive policy need not be formally embodied in an executive agreement in order for the policy to have juridical effect. As discussed above, although the Court found the executive policy favoring ICHEIC resolution to be "expressed unmistakably in the executive agreements signed by the President with Germany and Austria," it found further that "[t]his position, of which the agreements are *exemplars*, has also been consistently supported in the high levels of the Executive Branch, [citing statements by executive officials]."123 S.Ct. at 2390-91 (emphasis added). Although the agreements were said to be "exemplars" of the Executive's position on this issue, evidence of that position was not limited to the agreements. Thus, it was to the Executive's position, and not simply to the agreements, that the Court deferred. I believe that the Court's emphasis on the Executive's position rather than merely on the text of the agreements means that a court seeking to comprehend the substance of an executive policy should not confine its analysis to the text of executive agreements. As already discussed, the statements by executive officials concerning disposition

of Holocaust-era insurance claims show uniformly that the policy favoring ICHEIC resolution applies to claims against Generali.[8]

That I reached in *Generali* I a somewhat different conclusion-one more favorable to plaintiffs' view here-does not salvage their claims. In that earlier opinion, I declined to give conclusive weight to statements by executive officials endorsing ICHEIC resolution, emphasizing that no executive agreement at issue in this case could be read to preclude litigation of such claims in U.S. courts. *See Generali* I, 228 F.Supp.2d at 358 ("Generali's observation that the United States government has several times expressed its view that ICHEIC 'should be considered the exclusive remedy for resolving insurance claims from the World War II era'

8. Plaintiffs are skeptical that statements by executive officials like those at issue here can serve as an independent basis for ascertaining executive policy, and cite to the dissent's view in *Garamendi* that the Court should not "premise [ ] foreign affairs preemption on statements of that order [citing letters by Deputy Secretary Eizenstat] . . . lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch." (Joint Surreply in Opp'n to Generali's Second Motion to Dismiss at 3) (citing *Garamendi*, 123 S.Ct. at 2401 (Ginsburg, J., dissent)). However, as discussed above in the text, the majority in *Garamendi* expressly rejected the dissent's position, noting that "there is no suggestion that these high-level executive officials were not faithfully representing the President's chosen policy, and there is no apparent reason for adopting the dissent's 'nondelegation' rule to apply within the Executive Branch." 123 S.Ct. at 2391 n. 13.

[citation omitted] is irrelevant. Absent a statute or executive agreementsuspending plaintiffs' claims or an executive agreement that gives rise to specific foreign relations concerns . . . , the government's position is not controlling. . . ."). To the extent my earlier ruling conflicts with *Garamendi*, the latter of course controls.

Plaintiffs note also that the Executive Branch has not filed in this litigation a statement of interest, or otherwise intervened to support dismissal of their claims. (Plaintiffs' Joint Opp'n to Generali's Second Motion to Dismiss, at 72; Plaintiffs' Joint Surreply in Opp'n to Generali's Second Motion to Dismiss, at 2; Weiss Plaintiffs' Surreply in Opp'n to Generali's Second Motion to Dismiss, at 4-9; Surreply of Plaintiffs Lantos et al., at 2-4)[9] This argument too is of little consequence.

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9. One minor caveat is that, prior to the MDL Panel's transfer of claims against Generali in the *Anderman* action, the Government filed a statement of interest stating that dismissal of the case would be in the United States' foreign policy interests. (Statement of Interest of the United States of America in *Anderman v. Fed. Repub. of Austria*) As explained in note 3 above, claims against other defendants in *Anderman*-the Federal Republic of Austria and various Austrian companies-were dismissed by the Central District of California. The *Anderman* plaintiffs and Generali dispute whether the statement of interest was filed on behalf of all defendants named in that action, including Generali, or only on behalf of the Austrian entities. (Generali's Mem. in Support of its Motion to Dismiss, filed in *Anderman*, at 13-14; *Anderman* Plaintiffs' Opp'n to Generali's Motion to Dismiss at 6; Generali's Reply Mem. in Support of its Motion to Dismiss, filed in *Anderman*,

(Cont'd)

Although the Executive Branch is authorized by statute to file a statement of interest in any pending action, *see* 28 U.S.C. § 517 ("The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."), it is not required to file a statement in order for the court to take cognizance of its policy. Moreover, to the extent plaintiffs are suggesting that the Government's failure to intervene in this case suggests its ambivalence towards ICHEIC resolution of claims against Generali, that argument has little to commend it. There is no reason to infer from the mere fact of executive inaction that the policy favoring ICHEIC resolution does not encompass claims against Generali. I note here that the Government's decision to intervene, or not, in a particular case relating to foreign affairs, and what form its intervention should take were it to do so, is informed by a variety of intricate diplomatic and political considerations that make this sort of inferential reasoning by courts a perilous enterprise. *See Chicago & Southern Air Lines v. Waterman S S Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92

(Cont'd)

at 8-9) For the reasons discussed in the text, even assuming the Government filed its statement only on behalf of the Austrian entities, as the *Anderman* plaintiffs contend, that alone cannot be interpreted to mean that the executive policy favoring ICHEIC resolution is inapplicable to the claims against Generali.

L.Ed. 568 (1948) (describing "executive decisions [relating] to foreign policy" as "delicate, complex, and involv[ing] large elements of prophecy"); *Olegario v. United States*, 629 F.2d 204, 232 (2d Cir.1980); *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir.1974) (noting that "[t]he executive's institutional resources and expertise in foreign affairs far outstrip those of the judiciary") (citing *Waterman S S*, 333 U.S. at 111, 68 S.Ct. 431 (1948); *Curtiss-Wright*, 299 U.S. at 320, 57 S.Ct. 216).

Furthermore, the parties' submissions indicate that, if anything, the Executive Branch's decision not to file a statement of interest in this case appears to stem from an unwillingness to act on behalf of a private company absent a government-to-government agreement encompassing claims against the company in question. Thus, when the issue of governmental intervention on behalf of private companies was raised in a November 2000 ICHEIC meeting, ICHEIC Chairman Eagleburger responded as follows:

> If what is essential for the [private] companies is a legal peace that is sought by the United States government, they will not get it. The U.S. government will never agree to go into court on behalf of a specific company.

(Nov. 15-16, 2001, ICHEIC meeting minutes, Weiss Plaintiffs' Surreply in Opp'n to Generali's Motion to Dismiss Ex. 3, at 4) Ambassador James Bindenagel, the State Department's Special Envoy for Holocaust Issues,

confirmed Chairman Eagleburger's view, according to the minutes:

> Mr. Bindenagle [*sic*] said the issue is whether the U.S. government would intervene between insurance companies and victims. There is no role for the U.S. government, and there is therefore no place for them to intervene in the way they are intervening in the German Foundation agreement.

(*Id.*) (*See also* Jan. 16-17, 2001, ICHEIC meeting minutes, Weiss Plaintiffs' Surreply in Opp'n to Generali's Motion to Dismiss Ex. 4, at 2 (recording commission member's comment that "[t]he U.S. Government could not be expected to intervene in the U.S. courts on behalf of Generali, since there was no governmental connection")) In short, the lack of a predicate "governmental connection" appears to explain the Government's decision not to file a statement of interest in the instant lawsuits, not its indifference to whether claims against Generali in particular are handled in the courts. The repeated Executive Branch pronouncements that ICHEIC should be the exclusive remedy for all Holocaust-era claims, discussed above, supports this conclusion. Accordingly, the Government's decision not to file a statement of interest, or otherwise intervene, in this litigation cannot be construed to indicate support for this court's adjudication of plaintiffs' claims.

Plaintiffs' contend as well that ICHEIC's own rules and procedures permit ICHEIC claimants simultaneously to litigate their claims in U.S. courts. (Weiss Plaintiffs' Surreply in Opp'n to **Generali's** Second Motion to Dismiss, at 9-11; Surreply of Plaintiffs Lantos et al., at 4) However, the relevant inquiry for the purpose of determining whether the laws supporting plaintiffs' claims are preempted is not what ICHEIC's rules permit, but rather what the executive policy is regarding disposition of Holocaust-era insurance claims. Even assuming that ICHEIC's rules grant plaintiffs the simultaneous right to obtain relief in the courts, the policy favoring ICHEIC resolution of Holocaust-era insurance claims requires dismissal of their claims for the reasons discussed above.

Plaintiffs remaining objections were expressly considered and rejected in *Garamendi*, and therefore receive only brief consideration here. They argue that their state law causes of action cannot be preempted because Congress expressly delegated to the States the authority to regulate insurance through the McCarron-Ferguson Act, 59 Stat. 33, ch. 20, 15 U.S.C. §§ 1011-1015. (Plaintiffs' Joint Opp'n to Generali's Motion to Dismiss, at 76) The Court held that that Act cannot be read to condone state laws interfering with federal efforts to resolve Holocaust-era insurance claims. *See Garamendi*,\fs20fs20 123 S.Ct. at 2394. Finally, plaintiffs argue that dismissal of their claims is improper because ICHEIC continues to be an inadequate forum for addressing their claims. (Weiss Plaintiffs' Surreply in Opp'n to Generali's Second Motion to Dismiss, at 11-

18) However, the Court ruled that concerns about the adequacy of ICHEIC are irrelevant to the preemption analysis. *See* 123 S.Ct. at 2393 ("[O]ur thoughts on the efficacy of one approach versus another are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress.").[10]

III.

In addition to plaintiffs' core claims predicated on Generali's non-payment of policy benefits, they assert numerous claims alleging other instances of Generali's misconduct-for example, that Generali acted in "bad faith" by "recklessly or intentionally destroy[ing] evidence of the Insurance Policies . . . or fail[ed] to maintain duplicates in a safe location" (*Schenker* Compl. ¶ 72(d)); breached its duty of good faith and fair dealing by "[u]nreasonably asserting a 'nationalization' defense that was misleading, false, and untrue, in claiming that

10. In *Generali* I, I discussed at length the shortcomings of ICHEIC as a venue for processing Holocaust-era insurance claims. *See* 228 F.Supp.2d at 356-58. However, the context of that discussion was Generali's motion to dismiss on *forum non conveniens* grounds. As I explained there, a court considering such a motion must, as one step in its analysis, consider whether a defendant's proposed alternative forum-here, ICHEIC-is an adequate one. *See id.* at 350 (citing *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 73 (2d Cir.2001)). Nothing in *Garamendi* calls into question the prevailing methodology in the Second Circuit for resolving a *forum non conveniens* motion.

it was not responsible for the Policies because the government had nationalized and expropriated its business in 1945" (*Lightner* Compl. ¶ 27(a)); and engaged in unfair competition by "[u]nfairly, unlawfully, and fraudulently misrepresenting to the General Public, including numerous California residents, that 'very little information and few records regarding policies' exist, when, in fact, [Generali] maintains tens of thousands of these policies in its Trieste, Italy warehouse" (*Szekeres* Compl. ¶ 47(d)). These claims, however, were not brought in a vacuum; they appear to have been made primarily as support for plaintiffs' benefits claims discussed above. In any event, plaintiffs cannot recover independently on any of these claims because they do not appear to allege any cognizable injury other than that caused by Generali's non-payment of benefits, for which redress is available only through ICHEIC for the reasons discussed above. Should ICHEIC determine that a plaintiff is entitled to the policy benefits he seeks, that plaintiff will have no further cause for complaint. On the other hand, should ICHEIC determine that a plaintiff entitled to no award, or to a smaller award than he seeks, the remaining claims, examples of which are described above, are not independently actionable. Accordingly, plaintiffs' ancillary claims must also be dismissed.

* * * * * *

For the reasons stated above, **Generali**'s motion to dismiss is granted as to all actions.

SO ORDERED:

Appendix B

APPENDIX

PLAINTIFFS' CLAIMS AGAINST GENERALI

Named Plaintiff	*Claims*
Cornell (class action)	International law (¶¶ 48-51) Breach of insurance policies (52-58) Breach of fiduciary duties (59-64) Breach of duty to disclose (65-67) Conversion (68-70) Bad faith (71-73) Unjust enrichment (74-76) Unfair business practices under N.Y. General Business Law (77-92) Constructive Trust (93-96) Accounting (97-99)
Schenker (class action)	International law (63-66) Conversion (67-69) Unjust enrichment (70-71) Breach of insurance policies (72-78) Breach of fiduciary duty (79-83) Breach of special duty (84-86) Breach of duty to disclose

	(87-88) Bad faith (89-90) Conspiracy (91-93) Accounting (94-95) Unfair business practices under N.Y. General Business Law (96-112) Constructive Trust (113-115)
David	Breach of Insurance Policies (1-23) Bad Faith (24-25) Unjust Enrichment (26-31)
Lightner	Breach of duty of good faith and fair dealing (26-34) Breach of contract (35-38) Unfair business practices under Cal. Bus. & Prof.Code §§ 17200 and 17500 (39-47)
Szekeres	Breach of duty of good faith and fair dealing (33-41) Breach of contract (42-45) Unfair business practices under Cal. Bus. & Prof.Code §§ 17200 and 17500 (46-54)

Appendix B

Smetana (class action)	Breach of contract (78-83) Breach of duty of good faith and fair dealing (84-90) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (91-103) Constructive Trust (104-109) Accounting (110-114)
Mandil	Breach of duty of good faith and fair dealing (23-31) Breach of contract (32-35) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500
Brauns	Breach of duty of good faith and fair dealing (31-39) Breach of contract (40-43) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500)
Sladek	Breach of duty of good faith and fair dealing (41-48) Breach of contract (49-52) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (53-61) Unjust enrichment (62-67)

Appendix B

Weiss	Breach of contract (113-122) Holocaust Victims Insurance Act, Fl. stat. § 626.9543 (123-134) Re-establish papers pursuant to Fl. stat. § 71.011 (135-142) Intentional spoliation of evidence (143-145) Conversion (146-148) Unjust enrichment (149-151) Breach of fiduciary duty (152-155) Constructive trust (156-160) Breach of special duty (161-163) Conspiracy (164-166) Accounting (167-168) Declaratory judgment pursuant to Fl. Statutes, chap. 86 (169-173)
Tabaksman	Breach of contract (30-37) International law (38-42) Breach of fiduciary obligations (43-49) Breach of duty to disclose (50-53) Conversion (54-56) Bad faith (57-60) Unjust enrichment (61-63) Constructive trust (64-68) Accounting (69-71)

Appendix B

Haberfeld (class action)	Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 Cal. Admin. Code, Title 10, § 2695.4(a) & (e)(1) Cal. Admin. Code, Title 10, § 2695.7(g)
Lantos	Breach of duty of good faith and fair dealing (25-32) Breach of contract (33-36) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (37-45) Unjust enrichment (46-51)
More	Breach of duty of good faith and fair dealing (16-23) Breach of contract (24-27) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (28-36) Unjust enrichment (37-42)
Pioro	Breach of duty of good faith and fair dealing (16-23) Breach of contract (24-27) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (28-36) Unjust enrichment (37-42)

Appendix B

Sorter	Breach of duty of good faith and fair dealing (27-34) Breach of contract (35-38) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (39-47) Unjust enrichment (48-53)
Ungar	Breach of duty of good faith and fair dealing (16-23) Breach of contract (24-27) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (28-36) Unjust enrichment (37-42)
Weiss/Friedman	Breach of duty of good faith and fair dealing (19-26) Breach of contract (27-30) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (31-39) Unjust enrichment (40-45)
Zada	Breach of duty of good faith and fair dealing (16-23) Breach of contract (24-27) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (28-36) Unjust enrichment (37-42)

Appendix B

Anderman (class action)	Violations of Customary International Law (403-410) Imposition of a Constructive Trust (418-429) Unjust Enrichment (435-439) Conversion (440-443) Liability for Violations of International Law Under the Alien Tort Claims Act (444-455) Breach of Contract (456-461) California Holocaust Victim Insurance Relief Act of 1999 (462-474) Accounting (475-480) Disgorgement of Profits Pursuant to Cal. Business Code § 17200 *et seq.* (481-483)

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 12, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of April, two thousand and ten.

Docket No. 05-5612-cv

In re ASSICURAZIONI GENERALI, S.P.A.

Dr. Thomas Weiss, Erna Birnbaum Gottesman and Martha Birnbaum Younger,

Plaintiff Appellants,

v.

Assicurazioni Generali, S.p.A.,

Defendant-Appellee.

Edward David, as Personal Representative of the Estate of David David,

Plaintiff Appellant,

Appendix C

v.

Assicurazioni Generali, S.p.A.,

Defendant-Appellee.

Dr. Thomas Weiss, Erna Birnbaum Gottesman and Martha Birnbaum Younger having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

s/ Catherine O'Hagan Wolfe

APPENDIX D — U.S. LETTER BRIEF DATED OCTOBER 30, 2008

U.S. Department of Justice
Civil Division, Appellate Staff
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October 30, 2008

Via Federal Express

Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *In re Assicurazioni Generali*, Nos. 05-5602, et al.

Dear Ms. O'Hagan:

The United States of America respectfully submits this letter brief in response to the Court's August 1, 2008 letter to Secretary of State Condoleezza Rice. In its letter, the Court requested the Government's views on whether adjudication of the claims in *In re Assicurazioni Generali*, Nos. 05-5602, et al., "would conflict with the foreign policy of the United States."

Appendix D

It has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the exclusive forum and remedy for claims within its purview. The fact that ICHEIC has now concluded its operations does not alter the foreign policy of the United States. Claims against defendant Assicurazioni Generali ("Generali"), one of the original ICHEIC companies and an active participant in its operations, fall within the category United States policy seeks to address.

The United States takes no position on whether plaintiffs' claims are preempted by its foreign policy in light *of American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), except to the extent that these claims arise under state statutes such as the California Holocaust Victims Insurance Relief Act (HVIRA), which, as the Supreme Court held in *Garamendi*, impermissibly impede the conduct of foreign policy and are thus preempted.

I. The Foreign Policy of the United States Has Been That ICHEIC Should Be Regarded As the Exclusive Forum and Remedy For Claims Within Its Purview.

A. The ICHEIC Process.

The United States Government has long been involved in efforts to resolve claims arising out of Nazi-era harms, and obtaining reparations for these harms

was a principal object of post-war Allied diplomacy. *See generally Garamendi*, 539 U.S. at 401-408. Although restitution laws enacted by the West German Government provided compensation to many victims, they also left out many claimants and certain types of claims.

In 1998, a number of insurance companies jointly agreed with U.S. state insurance regulators and Jewish and Holocaust survivor organizations to create ICHEIC. Their aim was to establish "a just process . . . that will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust." Velie Dec., Exh. A ¶ 1, *In re Assicurazioni Generali*, No. MDL 1374 (M21-89) (S.D.N.Y. filed May 25, 2001).

Generali was one of ICHEIC's founding members and participated actively in its operations throughout the life of the organization. The company contributed $100 million to ICHEIC's overall settlement amount and also made its records available to ICHEIC, enabling researchers to match claimants to Generali policies even when the claimants were unaware or unsure that they were beneficiaries of a Generali policy.[1]

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1. In the ICHEIC process as a whole, ICHEIC participating companies made 7,747 monetary offers to claimants who did not initially know the name of the insurance company that had issued their policy. Lawrence S. Eagleburger & M. Diane Koken *with* Catherine Lillie, Int'l Comm'n on Holocaust Era Ins. Claims, *Finding Claimants and Paying Them: The Creation and Workings of the International*

(Cont'd)

Appendix D

From ICHEIC's inception, the United States has participated in the organization as an observer and has sought to support its efforts. In dealing with Holocaust-era claims, the United States has followed a policy of supporting non-adversarial mechanisms of resolving such claims as opposed to litigation. Such mechanisms, the United States believes, provide benefits to more victims, and do so faster and with less uncertainty, than does litigation. Non-adversarial mechanisms thus facilitate the two primary goals of U.S. policy in this area—justice and urgency.

Consistent with this policy, the United States has publicly recognized the importance of Generali and other companies' voluntary participation in ICHEIC. As Stuart Eizenstat[2] explained in congressional testimony in 2000, the Executive Branch

> commend[s] the five European insurance companies that have joined [ICHEIC] and strongly encourage[s] all insurers that issued

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(Cont'd)

Commission on Holocaust Era Insurance Claims 49 (2007), *available at* http://www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf. By way of comparison, the ICHEIC companies made offers on 5,448 claims in which the claimant knew the name of the insurer. *Id.*

2. As the Under Secretary of State and later Deputy Treasury Secretary and Special Representative of the President and Secretary of State on Holocaust Issues, Eizenstat was the chief American negotiator on Holocaust issues.

> policies during the Holocaust era * * * to join [ICHEIC] and participate fully in its program * * * *
>
> This is the best and most expeditious vehicle for resolving insurance claims from this period. And we support giving those companies who do join ICHEIC and cooperate with it, safe haven from sanctions, subpoenas and hearings in the United States relative to the Holocaust period.

The Legacies of the Holocaust, Hearing Before the S. Comm. on Foreign Relations, 106th Cong. 16 (2000) [hereinafter Eizenstat Senate Testimony].

B. The Executive Agreements.

While ICHEIC was being created and beginning its work, the United States was involved in facilitating complicated negotiations among European governments and companies, survivor groups, and claimants' representatives. Those negotiations were conducted against the backdrop of numerous class-action lawsuits filed in United States courts following German reunification.

The negotiations resulted in the signing of an executive agreement with Germany, and a joint statement by all the participants in the negotiations, that recognized the establishment of a German foundation funded with 10 billion DM. *Garamendi,* 539

U.S. at 405. The German government and German companies contributed to a fund that would be used to make payments to individuals who had suffered at the hands of German companies during the Nazi era, including those with unpaid insurance policies. *Id.* at 406-07; *see also* Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298 (2000) [hereinafter German Foundation Agreement]. Germany also agreed that, insofar as insurance claims were concerned, the Foundation would process claims according to ICHEIC procedures. German Foundation Agreement, 39 I.L.M. at 1299; *see also Garamendi*, 539 U.S. at 406-07.

The United States committed in the Foundation Agreement to file a statement of interest in cases in which Holocaust-era claims against German companies were pending in U.S. courts, declaring that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy" for the resolution of all claims brought "against German companies arising from their involvement in the National Socialist era and World War II." German Foundation Agreement, 39 I.L.M. at 1303; *see also Garamendi*, 539 U.S. at 406. The Foundation Agreement noted that plaintiffs in pending suits "face[d] numerous legal hurdles, including, without limitation, justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs." 39 I.L.M. at 1304. The Agreement and statements of interest filed by the

United States in conformity with that Agreement stated that they did not take a position on the legal contentions of the parties on those issues. *Id.* The Agreement further stated that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal," but it also stated that United States policy interests "favor dismissal on any valid legal ground." *Id.*

Shortly after entering into its agreement with the German government, the United States entered into two similar agreements with Austria. *See* Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Oct. 24, 2000, 40 I.L.M. 523 [hereinafter Austrian Fund Agreement]; Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund Reconciliation, Peace and Cooperation," U.S.-Austria, Jan. 23, 2001, 2001 WL 935261. Like the German agreement, the Austrian agreements allocated funds to cover (among other things) insurance claims against Austrian insurance companies, providing that such claims would be handled through Austrian entities that would largely follow ICHEIC procedures. Additionally, the United States pledged that if an Austrian insurance company were sued in U.S. courts over its Holocaust-era policies, the United States would file a statement of interest recommending that the suit be dismissed on any valid legal ground but also stating that the United States did

not suggest that its foreign policy interests concerning the Austrian agreements in themselves provide an independent legal ground for dismissal. Austrian Fund Agreement, 40 I.L.M. at 525, 528-29. The United States also concluded an agreement with France (though the agreement did not address insurance claims). The United States did not conclude any agreement with Italy.

C. The *Garamendi* Decision.

In *Garamendi*, the Supreme Court considered a constitutional challenge to a provision of California law that required each insurance company doing business in the State to publicly disclose detailed information concerning Nazi-era European policies issued by the company or its affiliates. The United States, as amicus curiae, urged the Court to invalidate the California statute.[3] The Supreme Court held that the statute

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3. The United States noted that the Supreme Court "has struck down state laws that engaged a State in matters affecting the Nation's external affairs 'even in [the] absence of a treaty' or an Act of Congress as inconsistent with the Constitution's assignment to the national government of the authority to conduct foreign relations or, in the commercial area, as inconsistent with the Foreign Commerce Clause." Brief for the United States as Amicus Curiae Supporting Petitioners at 12, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (No. 02-722) [hereinafter U.S. *Garamendi* Br.] (quoting *Zschernig v. Miller*, 389 U.S. 429, 441 (1968)). The United States thus urged that HVIRA was unconstitutional as an "intru[sion] into the field of foreign relations," as underscored by "[t]he conflict between (Cont'd)

impermissibly intruded into the conduct of U.S. foreign policy. The Court pointed to the history of negotiations over the German Foundation Agreement and Austrian Fund Agreement as evidence of a "consistent Presidential foreign policy * * * to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Garamendi*, 539 U.S. at 421. "As for insurance claims in particular," the Court continued, "the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information." *Id.* The Court held that the disclosure provisions of California law were preempted by federal law because they "interfere[] with the foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France." *Id.* at 413.

The Court explained that the executive agreements were not themselves preemptive; instead, the state statute was preempted because it conflicted with the

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(Cont'd)

the means chosen by the United States and by California to resolve Holocaust victims' insurance claims" in particular. *Id.* at 12-13. The United States further observed that HVIRA constituted "extraterritorial regulation" in violation of the Commerce Clause and Due Process Clause of the Fourteenth Amendment, both of which "prohibit a State from regulating activity outside its borders." *Id.* at 21.

federal foreign policy embodied and reflected in those agreements. *Id.* at 415-417, 420-22. Thus, the Court described the Austrian and German agreements as "exemplars" of the United States' foreign policy, but it also quoted and relied on various statements by executive branch officials, including statements by Deputy Treasury Secretary Stuart Eizenstat and others, setting out the position of the United States. These statements declared that ICHEIC "should be considered the exclusive remedy for resolving insurance claims from the World War II era" and that "a company's participation in the ICHEIC should give it a 'safe haven' from sanctions, subpoenas, and hearings relative to the Holocaust period." *Id.* at 422 (internal quotation marks omitted) (quoting Eizenstat Senate Testimony at 23, and *Restitution of Holocaust Assets: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 106th Cong. 173 (2000) (statement of Stuart Eizenstat)).

Consistent with the Supreme Court's explanation that U.S. foreign policy (and not any particular executive agreement) had preemptive force in *Garamendi*, the Supreme Court's decision in *Garamendi* made no distinctions between the insurance companies from Germany and Austria challenging the state statute, and Generali, which also was a petitioner in the *Garamendi* litigation, even though, as discussed, the United States had entered into executive agreements with Germany and Austria, but not with Italy. The brief of the United States as amicus curiae likewise drew no such distinctions among the petitioners. *See generally* U.S. *Garamendi Br.; see also id.* at 15 (stating that

application of the state statute to ICHEIC participants "undermines the United States' ability to persuade foreign governments and foreign companies to participate voluntarily in organizations such as ICHEIC"). And, as in *Garamendi*, the pertinent U.S. foreign policy interest is not diminished, for purposes of this case, by the absence of an executive agreement with Italy.

II. United States Foreign Policy Is Not Altered by the Conclusion of the ICHEIC Process.

That ICHEIC has now concluded its operations does not alter the foreign policy of the United States. It was never the foreign policy of the United States that claims should merely be held in abeyance pending conclusion of the ICHEIC process. The policy, as noted, was to encourage all insurance claims to be brought before ICHEIC, thereby promoting not only expeditious and fair resolution of such claims, but also closure for European companies. The obligations of the executive agreements with Germany and Austria still apply, and, as State Department officials have noted, it would undermine future efforts to secure voluntary compensation agreements if ICHEIC participants became subject to litigation as soon as ICHEIC had concluded. *See The Holocaust Insurance Accountability Act of 2007 (H.R. 1746): Holocaust Era Insurance Restitution After ICHEIC, the International Commission on Holocaust Era Insurance Claims, Hearing Before the H. Comm. On Fin. Servs.*, 110th Cong. 11 (2008) (statement of Amb.

Appendix D

J. Christian Kennedy, Special Envoy for Holocaust Issues, U.S. Dept. of State) (explaining that if ICHEIC participants are subjected to post-ICHEIC litigation, the result could discourage new countries from establishing compensation systems).

Although the ICHEIC process has concluded, the United States continues its efforts to obtain the cooperation of other nations in contributing to new programs that would potentially provide additional compensation to Holocaust survivors. Poland is on the verge of approving new compensation legislation, and the State Department has been working with Romania in the hopes of improving that country's existing program. Additionally, the United States is involved in ongoing discussions with several European governments in an effort to convene a second Holocaust assets conference. (The first such conference, which took place in 1998, helped to create momentum for the agreements concluded in the subsequent years.) This second conference is currently planned to take place in Prague in June 2009, and the United States is hopeful that it will be able to reach agreements with a number of countries from Central and Eastern Europe.[4]

4. In addition to the United States' efforts, the Conference on Jewish Material Claims Against Germany ("Claims Conference"), a key non governmental organization based in New York, has been involved in negotiating an expansion of German compensation programs. Some of these negotiations have been successful, and the results have inured to the benefit of many Americans. Other negotiations are still ongoing, and it is important to the United States that those efforts not be undermined.

For these reasons, to answer the Court's question, it is contrary to settled United States foreign policy for plaintiffs' claims to be adjudicated in the courts of the United States.[5] The United States takes no position, however, on the legal impact of that foreign policy on the Court's disposition of the claims, except with regard to those claims that arise under California's HVIRA or similar state statutes or state-law principles that single out claims involving events in a foreign country for special treatment. *See supra*, pp. 6-7 & n.3. As the Supreme Court held in *Garamendi*, California's HVIRA falls outside an area of traditional state competence, specifically and impermissibly intrudes into the sphere of foreign policy, impedes the accomplishment of national foreign policy objectives, and is thus preempted. *See* 539 U.S. at 418-420, 425-427. Florida's Holocaust Victims Insurance Act (HVIA) parallels the California statute in all material respects, imposing a variety of requirements with regard to Holocaust-era insurance

5. In his supplemental brief, plaintiff Edward David argues that his claim does not conflict with U.S. foreign policy, urging that Generali refused to honor his policy because it believed that the policy had been cancelled sometime before 1936. If the policy had lapsed by that date, David maintains, it could not have been successfully submitted to ICHEIC.

This view of the facts conflicts with the facts as stated in David's Complaint, *see* A-438, and the United States is not in a position to resolve this apparent factual dispute. However, when a lawsuit arises out of an insurance policy that was cancelled before the Holocaust Era (as that term is defined by ICHEIC), adjudication of the claim is not inconsistent with the United States' foreign policy.

policies on companies seeking to do business in Florida.[6] *See Garamendi*, 539 U.S. at 413 n.6 (noting the similarity between Florida's HVIA and California's HVIRA); *see also Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) (holding, in accord with the views of the United States, that Florida's HVIA violated due process because the state had insufficient connections to the European insurance contracts and companies that it regulated).[7] Claims under such provisions are foreclosed under *Garamendi*.

III. Conclusion

For the foregoing reasons, it would be in the foreign policy interests of the United States that ICHEIC be regarded as the exclusive forum for resolution of

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6. *See* Fla. Stat. § 626.9543(3)(a) (defining a "Holocaust victim" as "any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany"); *id.* § 626.9543(5) (imposing special claims handling requirements for insurance claims submitted by Holocaust victims or their beneficiaries); *id.* § 626.9543(6) (imposing special statutes of limitations for claims brought by Holocaust victims or their beneficiaries); *id.* § 626.9543(7) (imposing special disclosure requirements for policies issued to Holocaust victims).

7. The Brauns Complaint asserts claims under California's HVIRA. *See* Brauns Compl.¶ 45(q), A-248. Plaintiff Weiss asserts claims under Florida's HVIA. *See* Weiss Compl. ¶¶ 123-134, A-339 to A-341.

insurance claims against companies like Generali that participated in the ICHEIC process. Accordingly, it would be in the foreign policy interests of the United States that such claims not be pursued through the courts. Consistent with the statements of interest filed by the United States in cases covered by the German Foundation Agreement, the United States does not suggest that its foreign policy interests concerning these claims and ICHEIC in themselves furnish an independent basis for dismissal. Similarly, the United States takes no position on the various legal grounds that have been urged in favor of dismissal, except that it is the United States' view that plaintiffs may not rely on Holocaust-specific state statutes such as HVIRA (or state-law principles that similarly single out claims concerning events in a foreign country for special treatment). For the reasons given by the Supreme Court in *Garamendi* and by the United States in its brief in that case, such state law is preempted.

Respectfully submitted,

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APPENDIX E — SUPPLEMENTAL U.S. LETTER BRIEF DATED OCTOBER 27, 2009

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October 27, 2009

Via Federal Express
Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *In re Assicurazioni Generali S.P.A.*, Nos. 05-5612-cv, 05-5310-cv

Dear Ms. Wolfe:

The United States of America respectfully submits this supplemental letter brief in response to the Court's July 29, 2009 letter to Secretary of State Hillary Rodham Clinton. In its letter, the Court inquired whether the current administration adheres to the position expressed in the Government's October 30, 2008 letter brief.

Appendix E

A. The position of the United States continues to be that set out in our original letter brief. As we explained, "[i]t has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the *exclusive forum and remedy* for claims within its purview." United States's 10/30/08 Letter Br. at 1 (emphasis added). Holocaust-era insurance claims against the defendant, Assicurazioni Generali ("Generali"), fall within this category.

1. The United States has long believed that compensation for Holocaust-era injuries should be achieved through negotiation and cooperation with relevant parties. As the Supreme Court observed in *American Insurance Ass'n v. Garamendi*, there has been a "consistent Presidential foreign policy * * * to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." 539 U.S. 396, 421 (2003). Indeed, over many years, State Department negotiators have facilitated the resolution of class action lawsuits and helped parties reach agreements resulting in payments of over $8 billion to the victims of Nazi Germany. *The Holocaust Insurance Accountability Act of 2007 (H.R. 1746): Holocaust Era Insurance Restitution After ICHEIC, the International Commission on Holocaust Era Insurance Claims, Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 10 (2008) (statement of Amb. J. Christian Kennedy) [hereinafter Kennedy Testimony]. And with regard to "insurance claims in

particular, the national position has been to work with the ICHEIC." *Garamendi*, 539 U.S. at 421; *see also id.* at 422 (citing a statement from Stuart Eizenstat that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era" (quoting *Restitution of Holocaust Assets: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 106th Cong. 173 (2000)) (alterations supplied by the Court)).[1]

The United States's policy in this area reflects a consistent commitment to working towards achieving "some measure of justice for Holocaust victims and their families," and to do so in their lifetimes, rather than seeing victims and their families subjected to the prolonged uncertainty and delay of protracted litigation. *The Legacies of the Holocaust, Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. 19 (2000) (testimony of Stuart Eizenstat). Thus, the United States has negotiated agreements, and helped establish compensation mechanisms, in order to aid Holocaust victims and their families in "recovering property that was stolen from them, * * * enforcing their rights under insurance contracts that were abrogated," and receiving compensation "for personal injuries sustained and for

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1. As Under Secretary of State and later Deputy Treasury Secretary and Special Representative of the President and Secretary of State on Holocaust Issues, Stuart Eizenstat was the chief American negotiator on Holocaust issues. Ambassador Eizenstat currently serves as Special Adviser to the Secretary of State for Holocaust Issues.

slave labor and forced labor performed under brutal conditions." *Id.*

The United States believes that its long-standing, and ongoing, pursuit of cooperative compensation arrangements best achieves justice for the greatest numbers of Holocaust victims, survivors, and heirs. In order to ensure that large numbers of potential claimants could learn about ICHEIC and the claims process, for example, ICHEIC published advertisements in numerous newspapers, engaged in a global media campaign, posted lists of known and potential policyholders and other information on its website, and worked with Jewish organizations around the world. *See* Lawrence S. Eagleburger & M. Diane Koken *with* Catherine Lillie, Int'l Comm'n on Holocaust Era Ins. Claims, *Finding Claimants and Paying Them: The Creation and Workings of the International Commission on Holocaust Era Insurance Claims* 21-22, 37-38 (2007), *available at* http://www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf. Moreover, we believe that non-adversarial mechanisms such as ICHEIC provide the most effective way of ensuring compensation for the many victims who might be unable to meet evidentiary standards required by courts.

2. The Government's efforts to encourage ICHEIC are part of a larger policy to ensure the greatest compensation for the greatest number of Holocaust victims and their heirs, as well as to support broad "legal peace" for countries and companies subject to ongoing claims. That policy underlies the executive agreements

the United States entered into with Austria and Germany. But importantly, this foreign policy exists independent of those agreements, and is not cabined by them or limited by their explicit terms. As the Supreme Court observed in *Garamendi*, the Austrian and German agreements are "exemplars" of American national policy, 539 U.S. at 422; they do not define or limit the policy.

As an Italian corporation, Generali is not subject to the commitments of an executive agreement, as no such agreement was entered into with Italy.[2] However, the Government's strong foreign policy favoring negotiated and cooperative resolutions to Holocaust-era disputes

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2. Because no executive agreement specifically applies to claims against Generali, the United States has no international legal obligation to file a statement of interest addressing such claims. *Cf.* Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Oct. 24, 2000, 40 I.L.M. 523, 525, 528-29 (stating that the United States will file a Statement of Interest in Holocaust cases against Austrian companies sued in American courts); Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298, 1300, 1303-04 (2000) (stating that the United States will file a Statement of Interest in Holocaust cases against German companies sued in American courts). As discussed, however, the obligations contained in the executive agreements exemplify but do not define the foreign policy interests of the United States; for the reasons articulated in our filings, those foreign policy interests encompass claims against Generali.

applies broadly, and this policy has been instrumental in securing the cooperation of our key partners as we pursue a measure of justice for Holocaust victims. That policy successfully encouraged companies, including Generali, to participate in the ICHEIC process. And as Ambassador J. Christian Kennedy [3] has explained, if suits against ICHEIC participants continue, the result could be to "undermine the many positive working relationships we have built over the years," and to discourage other companies and countries from voluntarily pursuing restitution programs. Kennedy Testimony at 11.

Moreover, Generali was an early and active participant in ICHEIC, and along with the other ICHEIC companies it has agreed to continue processing claims in accordance with the relaxed standards of proof developed at ICHEIC. Thus, although ICHEIC has ceased operations, anyone who believes an ICHEIC insurance company has failed to pay a claim may send his application to that company or to the Holocaust Claims Processing Office of the New York State Banking Commission. Stuart E. Eizenstat, *Opening Plenary Session Remarks At Prague Holocaust Era Assets Conference* (June 28, 2009), *available at* http://www.state.gov/p/eur/rls/rm/2009/126158.htm. The United States continues to encourage this ongoing cooperation by all ICHEIC participants, not simply by

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3. Ambassador Kennedy served as Special Envoy for Holocaust Issues during the prior administration, and continues to serve in that capacity during the current administration.

those whose activities happen to be covered by specific executive agreements.

In addition, the United States continues to be active in calling on countries to take new concrete measures to assist Holocaust survivors. At the Prague Holocaust Era Assets Conference in June 2009, for example, the United States asked attendees to increase their restitution efforts on a number of fronts, including for stolen art and immovable property. *See id.* In response, the Czech government pledged to establish an institute that (among other things) will work to develop standards to govern voluntary compensation programs in some of these areas. *See* Terezin Declaration, June 30, 2009, http://www.state.gov/p/eur/rls/or/126162.htm.

Further litigation against ICHEIC participants would foment adversarial relationships between claimants and insurance companies and potentially interfere with efforts to ensure the continued processing of insurance claims using relaxed standards of proof. Such litigation may also impede efforts to secure further voluntary compensation for Holocaust victims and their families under such mechanisms as are contemplated under the Terezin Declaration. Accordingly, adjudication of this suit would be contrary to United States foreign policy interests.

B. The purpose of this filing, like that of the U.S. government filings made pursuant to the executive agreements, is not to urge a particular legal ground for dismissal but to inform the Court of the strong foreign

policy favoring negotiated and cooperative resolution of Holocaust-era disputes. Thus, as in our prior brief, the United States in general takes no position as to the legal impact of its foreign policy concerns on the disposition of plaintiffs' claims. The one exception consists of claims under Holocaust-specific state laws and principles like the California Holocaust Victims Insurance Relief Act (HVIRA); as we explained in our prior brief, such claims fall squarely within the Supreme Court's holding in *Garamendi* and are therefore legally precluded. *See* United States's 10/30/08 Letter Br. at 10.

Plaintiff Weiss mistakenly urges that this position is inconsistent with that asserted in the U.S. Government's 2000 brief in *Gerling v. Low*, 240 F.3d 739 (9th Cir. 2001). *See* 1/8/09 Second Notice of Supp. Auth. at 1-3. In the *Gerling* brief, the Government stated that the German Foundation Agreement "itself" did not preclude individuals from filing suit, and we also stated that the Agreement did not "by its terms" preempt California's HVIRA. 1/8/09 Second Notice of Supp. Auth. Exh. at 8-9. Further, we observed the existence of language in the Agreement declaring that "'the United States does not suggest that its policy interests concerning the Foundation [discussed in the Agreement] in themselves provide an independent legal basis for dismissal'" of claims in U.S. courts. *Id.* at 6 (quoting from the Foundation Agreement); *see also id.* at 9.

Those statements and observations were correct, and are entirely consistent with our October 2008 letter

brief. The Government's *Gerling* brief explained that even though the Foundation Agreement itself did not preempt the California statute, enforcing HVIRA would be contrary to national foreign policy and should be precluded as interfering with the federal government's ability to speak with one voice in the conduct of foreign affairs. *See id.* at 22-27. As was the case then, the Government's foreign policy interests are not today limited to the terms, or even to the existence, of particular agreements. Indeed, the agreements with Germany and Austria were part of an effort to accomplish broader foreign policy goals, which we have described above. The Supreme Court ultimately determined that the challenged provisions of the California statute conflicted with U.S. foreign policy and could not constitutionally be enforced. *See Garamendi*, 539 U.S. at 401, 413-420. That holding is, of course, binding here.

* * *

In our prior letter brief, and again in this brief, we have explained that it is in the foreign policy interests of the United States for ICHEIC to be the exclusive forum for the resolution of claims within its purview. These interests exist independent of the specific executive agreements that are "exemplars" of United States policy, and the interests apply with full force to the claims at issue here, which are not covered by an executive agreement. The United States takes no position on the legal impact of its foreign policy on the Court's disposition of the claims before it, except to the

extent that plaintiffs' claims rely on statutes or state law principles similar to those that *Garamendi* held unenforceable. In sum, the position stated in the Government's October 2008 letter brief continues to be the position of the United States.

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